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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 803.

THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

GUS B. OHLE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

FILED NOVEMBER 29, 1884.

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INDEX.

	Original	Print.
Caption	1	1
Transcript from circuit court of Polk Co., Iowa	3	1
Petition	3	1
Motion for security for costs	7	2
Original notice	10	3
Motion to strike motion for costs	12	4
Affidavit of P. G. Bryan	13	5
Motion to reject cost bond	15	6
Demurrer to petition	17	6
Amendment to petition	18	6
Demurrer to amendment	20	7
Answer	22	8
Motion to strike answer	24	8
Petition for removal	25	9
Bond for removal	28	10
Petition for removal	31	11
Bond for removal	35	12
Order on motion to strike motion for cost bond	38	13
for security for costs	39	13
Order disapproving bond for costs	40	13
Order on motion to reject cost bond	41	14
Demurrer to petition withdrawn	41	14
Order on demurrer to amend petition	41	14

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	Original.	Print.
Orders refusing removal	42	14
Clerk's certificate	43	15
Motion to remand	45	15
Order granting leave to file plea in abatement	47	16
Order granting leave to withdraw motion to remand, &c.	49	16
Plea to jurisdiction	52	16
Appellant's abstract of record in supreme court of Iowa	58	18
Petition	58	18
Affidavits and motion for security for costs	60	19
Affidavit of P. Gad Bryan	62	20
Cost bond	64	20
Motion to reject bond, &c.	67	21
Answer	68	21
Motion to strike answer	68	22
Petition for removal	69	22
Bond for removal	72	23
Amended petition for removal	75	23
Defendant's assignment of errors	77	24
Appellant's brief	79	25
Appellee's brief	98	30
Trial notice	103	32
Motion and affidavit for continuance	105	32
Affidavit resisting continuance	111	34
Submission on motion for continuance	118	35
Affidavit in reply on motion for continuance	120	36
Order overruling motion for continuance	123	36
Answer and demurrer to plea	125	37
Defendant's requests as to instructions to jury	130	38
Cause submitted to jury	134	39
Judgment	136	39
Bill of exceptions	139	40
Testimony of Gus B. Ohle	140	40
Exhibit A—Affidavit and motion for security for costs	157	48
Defendant's requests as to charge	159	48
Instructions of the court	162	49
Exceptions to charge	183	55
Special findings	183	55
Bond	187	56
Writ of error	191	57
Citation	193	58
Service of citation	193½	58
Clerk's certificate	194	58

1 Pleas in the circuit court of the United States for the southern district of Iowa, central division, at a term thereof begun and holden at the United States court-house in the city of Des Moines, in said district, before the Honorable James M. Love and O. P. Shiras, judges, on the third Tuesday of October, 1884, it being the twenty-first day of October, A. D. 1884.

Attest: E. R. MASON, *Clerk*.

2 Be it remembered that heretofore, to wit, on the 13th day of May, A. D. 1884, a transcript of record from the circuit court of the State of Iowa in and for Polk county in a certain cause, wherein Gus. B. Ohle was plaintiff and The Chicago and Northwestern Railway Company was defendant, was filed in the clerk's office of the United States circuit court for the southern district of Iowa, central division; which said transcript is in the words and figures following, to wit:

3 *Petition.*

In the Circuit Court, Polk Co., Iowa. January Term, 1884.

GUS. B. OHLE, Pl'ff,

vs.

THE CHICAGO AND NORTHWESTERN RAILWAY CO., Def't.

The said pl'ff alleges that he now is and for a long time has been a resident and citizen of the State of Illinois, and the def't now is and has long been a citizen of the same State.

That the said def't is a railroad corporation, and as such is now engaged in operating a line of railway in Polk Co., Iowa; and the def't was engaged as such corporation in operating a line of railway in Story Co., Iowa, in the month of April, 1880. That in the same month the pl'ff, then a minor of the age of about eighteen years, was in the employ of the def't as one of a gang of laborers connected with one of def't's construction trains on its said line of road in Story Co., Io-a. That about the middle of said

4 month of April, 1880, the said pl'ff, with the others of said gang of laborers, was by and under the orders and direction of the def't's employees in charge of said gang and train working in a deep cut on said line of road near the town of Ames, in said Story Co. That while thus engaged the def't's said employees negligently failed to send any one to watch for and signal the approach of a passenger train on said road then coming and about due, and while the pl'ff and the others of said gang were thus engaged at work the said passenger train rapidly approached them and the def't's employees in charge thereof negligently failed to give any warning of its approach, thereby negligently preventing the said construction train from taking reasonably sufficient time to get out of the way. That as soon as def't's employees in charge of said gang and construction train were aware of the approach

5 of said passenger train they ordered and required the pl'ff and the others of said gang to mount the flat cars in said construction train, and the said pl'ff, in obedience to said orders and in dis-

charge of his duty as such laborer and in the exercise of proper care and diligence, attempted to mount one of said flat cars, and while he was in the act of climbing thereon, and without allowing him sufficient time to get on, the employees of def't in charge of said gang and construction train negligently and without proper care for the safety of said gang of laborers caused said train to start suddenly and with a rapid motion, whereby the pl'ff, without fault on his part, was thrown and his foot caught by the brake bearer on said flat car and his leg and ankle thereby broken, dislocated, mashed, and torn, and otherwise injured, so that nearly ever since he has suffered great pain and anguish, and will so suffer by reason thereof in the future, and pl'ff has ever since been, and
6 always will be during his lifetime, crippled and disabled. That pl'ff has been damaged by the wrongs and injuries aforesaid in the sum of twenty thousand dollars, for which he demands judgment against the said def't, with costs.

The pl'ff further says that prior to the Sept. term of this court in 1881, he, being then a minor, commenced an action in this court by his next friend, Chas. Ohle, against the def't, to recover for the wrongs and injuries aforesaid, and said cause was removed to the United States circuit court at Des Moines, in the central division of the southern district of Iowa, and the pl'ff having obtained his majority in April, 1883, the said U. S. circuit court, at the Oct. term in 1883, substituted this pl'ff as pl'ff in his own name and right, and ordered said cause further prosecuted in pl'ff's name; and, at the said Oct. term, the said U. S. circuit court ordered said cause dismissed without prejudice, on motion of the pl'ff.

(Signed) BRYAN AND BRYAN,
Att'ys for Pl'ff.

7 (Endorsed:) C. C. Gus. B. Ohle *vs.* C. & N. W. R'y Co. Petition. 6632,—11,—440,—9, in O. Filed Nov. 19th, 1883. (Signed) P. D. Ankeny, clerk.

Copy fee, $3.00; $1.50 paid by Bryan and Bryan for pl'ff.

In the Polk County Circuit Court, State of Iowa.

GUS. B. OHLE
vs.
THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

STATE OF IOWA,)
Boone County,) *ss:*

I, H. G. Burt, being first duly sworn, on oath say: That I am the superintendent of the Iowa Division of the Chicago and Northwestern Railway Company, which includes the main line from Clinton, Iowa, to Council Bluffs, Iowa, together with several branches; that I am acquainted with the facts in regard to the injury of
8 Gus. B. Ohle, for which the above suit is brought, and that the defendant has a good defense to the entire claim made by the plaintiff in said cause; and that the plaintiff is a non-

resident of the State of Iowa, as he claims in his petition in this case, and as I believe.

(Signed) H. G. BURT,
Sup't Iowa Div.

Subscribed and sworn to before me and in my presence by H. G. Burt this 22nd day of Dec., 1883.

[Notarial seal.] (Signed) S. R. DYER,
Notary Public in and for Boone Co., Iowa.

STATE OF IOWA, } *ss:*
Linn County, }

I, N. M. Hubbard, being first duly sworn, on oath say: That I am the attorney for the defendant in the above-entitled cause; that the said cause has been once tried in the Federal court at Des Moines, during the month of October, 1883; that on said trial over
9 twenty witnesses were examined, including several medical witnesses; that the probable costs of the trial of this case in this court, together with the costs of the supreme court in case the same should be appealed, will be, as I believe, about the sum of five to eight hundred dollars.

(Signed) N. M. HUBBARD.

Subscribed and sworn to before me and in my presence by N. M. Hubbard this 24th day of Dec., 1883.

F. F. DAWLEY,
Notary Public in and for Linn County, Iowa.

Upon the foregoing affidavits of H. G. Burt and N. M. Hubbard the defendant now moves the court to require the plaintiff to give a bond in the sum of fifteen hundred dollars, with a sufficient surety to be approved by the clerk, for the payment of all costs which may accrue in the action in the court in which it is brought, or in any other to which it may be carried, either to the defendant or to the officers of the court.

WHITING S. CLARK &
N. M. HUBBARD,
Att'ys for Defendant.

10 (Endorsed:) No. 6632. Gus. B. Ohle *vs.* Chi. and N. W. R'y Co. Motion to file cost bond. Filed Jan. 2d, 1884. P. D. Ankeny, by L. A. Wilkinson, deputy.

Original Notice.

In the Circuit Court of the State of Iowa, in and for Polk County. January Term, A. D. 1884.

GUS. B. OHLE, Plaintiff,
vs.
THE CHICAGO AND NORTHWESTERN RAILWAY CO., Defendant.

To said defendant The Chicago and Northwestern Railway Co.:

You are hereby notified that on or before the 10th day of Dec., A.

D. 1883, the petition of plaintiff in the above-entitled cause will be filed in the office of the clerk of the circuit court of the State of Iowa in and for Polk county, claiming of you the sum of twenty thousand dollars as money justly due from you on account of personal injuries inflicted upon him by the negligence of your employees, near Ames, in Story county, Iowa, in April, 1880.

11 You are also notified that the undersigned claim and have an attorney's lien on said claim for services as pl'ff att'ys rendered, and to be rendered in collecting said claim, in this action, and one heretofore brought amounting to ten thousand dollars.

BRYAN AND BRYAN.

And that unless you appear thereto and defend before noon of the second day of the Jan'y term, A. D. 1884, of the said court, which will commence on the second day of Jan'y, A. D. 1884, default will be entered against you and judgment rendered thereon.

_____, _____,

Attorney for Plaintiff.

In the Circuit Court of Polk County, Iowa.

This notice came into my hand November 20th, 1883, and I certify that I personally served the same on the within named The Chicago and Northwestern Railway Co. by reading the same to W. W. Chamberlain, agent for said company, and delivering him a copy of the same in Polk county, Iowa, on the 20th day of November, 1883.

12 A. D. LITTLETON,
Sheriff of Polk County, Iowa,
By F. A. BAYLIES, *Deputy.*

Sheriff's fees, $ .90.

(Endorsed:) Original notice. Circuit court. Gus. B. Ohle *vs.* C. and N. W. R'y Co. Received Nov. 19th, 1883. A. D. Littleton, sheriff Polk Co., Iowa. Filed Nov. 21st, 1883. P. D. Ankeny, clerk. Bryan and Bryan, plaintiff's attorneys.

Motion.

Polk C. C. Jan. Term, 1884.

GUS. B. OHLE *vs.* C. AND N. W. R'Y CO.

Comes now said pl'ff and moves the court to strike from file def't motion to require pl'ff to give security for costs, because—

1st. Said motion is not sworn to by the defendant, nor by any of its employees, agents, or officers having charge of the defense of this suit so as to bind the def't thereby.

13 2d. Said motion does not state that def't believes or that pl'ff is a non-resident of Iowa.

3rd. The facts required to be verified by affidavit are not sworn to by any one, nor authenticated, as required by law.

BRYAN AND BRYAN,
Att'ys for Pl'ff.

(Endorsed:) 6632. Law. Gus. B. Ohle *vs.* C. and N. W. R'y Co. Motion to strike out. Filed Jan. 3d, 1884. P. D. Ankeny, clerk. By L. A. Wilkinson, deputy.

Polk C. C. Jan. Term, 1884.

GUS. B. OHLE *vs.* C. AND N. W. R'Y CO.

I, P. Gad. Bryan, being sworn, say that I am att'y for pl'ff in said cause, and have had the entire charge thereof; that the same was originally commenced in this c't and transferred to the Federal court, and def't made a motion in said Fed. c't to require pl'ff to se-
14 cure costs therein, and the pl'ff was excused therefrom by reason of his inability to give said security; that this cause was pending a long time in said Federal court, and was tried at the Oct. term thereof in 1883, and the jury disagreed, and the taxed costs in said Federal court for which def't is liable was only $118.65, as shown by a slip hereto attached, given affiant by the deputy cl'k of said Fed. c't, and fees are higher in said Fed. c't than in this court.

Affiant further says that he conducted said trial in the Fed. c't for the pl'ff, and that he believes def't has no honest defense to pl'ff's right to recover in this action, and that its pretended defense is false, and is not founded in truth.

Affiant further says pl'ff is poor, and an order of this court requiring him to give a large bond for costs would substantially be a denial of justice, and that the foregoing affidavit has been read over by affiant, and is true, as he verily believes.

P. GAD. BRYAN.

15 Subscribed and sworn to before me, Jan'y 26th, 1884.

P. D. ANKENY, *Clerk.*
L. A. WILKINSON, *Deputy.*

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$118	65

(Endorsed:) 6632. Ohle *vs.* C. & N. W. R'y Co. Counter affidavit. Filed Jan. 26th, 1884. P. D. Ankeny, clerk, by L. A. Wilkinson, deputy.

In the Circuit Court of Iowa, in and for Polk County.

GUS. B. OHLE *vs.* THE CHICAGO AND NORTHWESTERN R'Y CO.

Mo. by def'ts to disapprove and reject cost bond as defective and insufficient.

16 Def'ts move the court to disapprove and reject the cost bond filed herein by pl'ff as an amended bond, as defective and insufficient, and strike the same from the files, because the surety therein is bound by no obligation or sum therein.

2d. To dismiss said action for want of a cost bond as ordered.

N. M. HUBBARD &
WHITING S. CLARK,
Def'ts Att'ys.

(Endorsed:) C. C. Polk Co. Gus. B. Ohle *vs.* C. & N. W. R'y Co. Mo. to strike cost bond and dismiss action. Filed Feb. 6th, 1884. P. D. Ankeny, clerk, by L. A. Wilkinson, deputy. N. M. Hubbard & Whiting S. Clark, def'ts att'ys.

17 *Demurrer to Pl'ff's Petition.*

In the Circuit Court of Iowa, in and for Polk County.

GUS. B. OHLE *vs.* THE CHICAGO & NORTHWESTERN R'Y CO.

The def't demurs to the pl'ff's petition herein, and for cause of demurrer states:

1st. That the cause of action therein alleged is barred by the statute of limitations on the face of the petition because the alleged cause of action is for a personal injury which occurred more than two years before the commencement of this action, and the pl'ff has once commenced his action for said alleged cause after he attained his majority, & it does not appear on the face of the petition that the pl'ff failed in said former action for any cause except negligence in its prosecution. Wherefore def't asks judgment for costs.

N. M. HUBBARD &
WHITING S. CLARK,
Def'ts Att'ys.

18 (Endorsed:) C. C., Polk Co., Ia. Gus. B. Ohle *vs.* C. and N. W. R'y Co. Filed Feb. 11th, 1884. P. D. Ankeny, clerk. By L. A. Wilkinson, deputy. Demurrer to petition. N. M. Hubbard, Whiting S. Clark, def'ts att'ys.

Am'd't to Petition.

In the Circuit Court, Polk Co., Ia. Jan'y Term, 1884.

GUS. B. OHLE, Pl'ff, *vs.* THE C. & N. W. R'Y CO., Def't.

The said pl'ff, by leave of court for an amendment to his petition, herein says:

That after this pl'ff was substituted as sole pl'ff in his own name

and right in said action, as stated in his petition, he prepared for the trial thereof, and at the Oct. term, 1883, of said U. S. c't, the said cause was so far tried as to submit the evidence therein
19 and arguments of counsel and charge of the court to a jury, who retired to consider of their verdict, and, failing to agree, were discharged by said U. S. c't.

That the pl'ff did not fail in said action in said U. S. c't and the same was not dismissed because of any negligence on the part of pl'ff in the prosecution thereof; that the same could not have been again tried by said U. S. court until the May term, 1884, and nothing further was required of the pl'ff in said cause or could have been required until the said May term.

That after the said trial in U. S. c't the pl'ff was fully satisfied that he had not been able and never would be able to obtain a fair trial to an impartial jury in this action in the said U. S. c't.

Whereupon pl'ff demands judgment as in his petition.

BRYAN AND BRYAN,
Atty's for Pl'ff.

20 (Endorsed:) 6632, law. Gus. B. Ohle *vs.* C. & N. W. R'y Co. Am'd't to petition. Filed Feb. 14th, 1884. P. D. Ankeny, clerk, by L. A. Wilkinson, deputy. Bryan and Bryan.

Demurrer to Amended Petition.

In the Circuit Court of Iowa, in and for Polk County.

GUS. B. OHLE *vs.* THE CHICAGO & NORTHWESTERN R'Y CO.

The defendant demurs to the pl'ff's amended petition herein and for cause of demurrer states:

That the alleged cause of action therein is, on the face of said petition, barred by the statute of limitations; that said alleged cause of action is founded on an alleged injury to the person and occur-ed more than two years prior to the bringing of this action, and
21 that the pl'ff since he became 21 years of age commenced his action for said alleged injury, which failed and was dismissed on his own motion, and for his failure and negligence to prosecute the same, and that the facts stated as reasons for his failure and negligence to prosecute said action are insufficient to excuse or show absence of negligence in prosecuting said action on the part of said pl'ff.

Wherefore def't asks judgment for costs.

N. M. HUBBARD &
WHITING S. CLARK,
Def't's Att'ys.

(Endorsed:) C. C. Polk Co., Ia. Gus. B. Ohle *vs.* C. & N. W. R'y Co. Demurrer to amended petition. Filed Feb. 18th, 1884. P. D. Ankeny, clerk, by L. A. Wilkinson, deputy. N. M. Hubbard & Whiting S. Clark, def't's att'ys.

22 In the Circuit Court of Iowa, in and for Polk County.

GUS. B. OHLE *vs.* THE CHICAGO & NORTHWESTERN R'Y CO.

For answer and defense to the pl'ff's petition herein the def't states:

I.

Def't denies each and every allegation therein.

II.

For further and other defense herein def't says that pl'ff's alleged of action is barred by the statute of limitations; that said cause of action is for an alleged injury to the person, and occurred more than two years prior to bringing this action, and that the pl'ff, after more than two years from the time said cause of action occurred, and after he became 21 years of age, commenced his action
23 for said alleged injury in a court of competent jurisdiction, and failed, by reason of his own negligence, to prosecute the same, and said action was dismissed.

III.

Struck out by court.

For further answer and defense def't says that said action is brought and based on section 1307 of the Code of Iowa, which is repugnant to and in violation of section one of the 14th Amendment to the Constitution of the United States, and that pl'ff received his alleged injury by reason of the negligence of a coemployee.

Wherefore def't asks judgment for costs.

N. M. HUBBARD &
WHITING S. CLARK,
Def's Att'ys.

(Endorsed:) C. C. Polk Co., Ia. Gus. B. Ohle *vs.* C. & N. W. R'y Co. Def't's answer. Copy fee, 50c. Filed Feb. 28th, 1884. P. D. Ankeny, clerk, by L. A. Wilkinson, dep'y. N. M. Hubbard & Whiting S. Clark, def't's att'ys.

24 In Polk Co., Ia., Cir. C't, Jan'y Term, 1884.

GUS. B. OHLE, pl'ff, *vs.* THE C. & N. W. R'Y CO., def't.

The pl'ff moves the court to strike out the second (2) and third (3) divisions of def't's answer, because—

1st. The said 2nd division pleads the statute of limitation; and the same question appeared on the face of the petition, and was raised on demurrer by def't and decided by the court.

2nd. The said 3rd division presents no issue of fact to be tried, but raises an unmixed question of law that clearly appears on the face of the petition, and could have been tried on demurrer.

BRYAN AND BRYAN,
Att'ys for Pl'ff.

(Endorsed:) No. 6632, law. Gus. B. Ohle *vs.* C. & N. W. R'y Co. Motion to strike out 2d & 3d div. of ans. Filed
25 Feb. 29th, 1884. P. D. Ankeny, clerk, by L. A. Wilkinson, deputy. Bryan and Bryan.

Petition for Removal to the Circuit Court of the United States, Southern District of Iowa, Central Div.

In the Circuit Court of Iowa, in and for Polk County.

GUS. B. OHLE *vs.* THE CHICAGO & NORTHWESTERN R'Y CO.

To said circuit court:

Your petitioner respectfully shows to this honorable court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars; that the controversy in said suit is between citizens of different States, and that the petitioner was, at and before the time this suit was com-
26 menced, and at all times since has been and still is, a corporation duly organized and existing under and by virtue of the State of Illinois and a citizen of said State, with its principal place of business in said State of Illinois, and that your petitioner has never been organized under the laws of Iowa, and never was and is not now a citizen of the State of Iowa. And that the pl'ff, Gus. B. Ohle, was at and before the time of bring this suit, and at all times since has been and still is, a citizen of the State of Iowa and a resident thereof.

And your petitioner offers herewith a bond with good and sufficient surety for his entering in said circuit court of the United States on the first day of its next session a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court of the United States, if said court shall hold that this suit was wrongfully or improperly removed thereto.

27 And your petitioner prays this honorable court to proceed no further herein, except to make the order of removal required by law, and to accept the said surety and bond, and to cause the record herein to be removed into said circuit court of the United States in and for the southern district of Iowa, central division; and petitioner will ever pray.

THE CHICAGO & NORTHWESTERN R'Y CO.,
By its Att'ys, N. M. HUBBABD & WHITING S. CLARK.

STATE OF IOWA, *Polk County,* } *ss:*

I, N. M. Hubbard, being duly sworn, on oath say: That I am attorney for the Chicago and Northwestern Railway Company, the petitioner above named; that I have read the foregoing petition and know the contents thereof, and that the statements *and that the statements* and allegations therein contained are true, as I verily believe.

N. M. HUBBARD.

28 Subscribed and sworn to by said N. M. Hubbard before me this 5th day of March, 1884.

[Notarial seal.] JOHN D. JORDAN,
Notary Public, Polk Co., Iowa.

(Endorsed:) C. C., Polk Co., Ia. Gus. B. Ohle *vs.* The Chicago and Northwestern R'y Co. Petition for removal. Filed March 7th, 1884. P. D. Ankeny, clerk, by L. A. Wilkinson, deputy. N. M. Hubbard & Whiting S. Clark, def't's att'ys.

Bond.

Know all men by these presents, that the Chicago & Northwestern Railway Co., as principal, and J. J. Smart, as sure*ties*, are held and firmly bound unto Gus B. Ohle in the penal sum of two hundred and fifty dollars; for the payment whereof, well and truly to be made unto the said Gus. B. Ohle, his heirs, representatives,
29 and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents.

Yet upon these conditions: The said Chicago & Northwestern R'y Co., having petitioned the circuit court of Polk county, State of Iowa, for the removal of a certain cause therein pending, wherein said Gus. B. Ohle, plaintiff, and said Chicago & Northwestern R'y Co., defendant, to the circuit court of the United States in and for the southern district of Iowa, central division:

Now, if the said Chicago & Northwestern R'y Co., your petitioner, shall enter in the said circuit court of the United States on the first day of its next session copies of all process, pleadings, depositions, testimony, and other proceedings in said cause, and shall pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was
30 wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this 5th day of March, 1884.

THE CHICAGO & NORTHWESTERN R'Y CO.,
By WHITING S. CLARK, *Att'y.*
J. J. SMART.

STATE OF IOWA,)
Polk County,) *ss:*

I, J. J. Smart, of said county, the surety named in the foregoing bond, being duly sworn, do depose and say: That I am a resident of the State of Iowa; that I am worth the sum of five hundred dollars beyond the amount of my debts; that I have property in the State of Iowa liable to execution equal to the sum of five hundred dollars.

Subscribed and sworn to before me this 5th day of March, A. D. 1884.

[Notorial seal.] JOHN D. JORDAN,
Notary Public, Polk Co., Ia.

(Endorsed:) C. C., Polk Co., Ia. Gus. B. Ohle *vs.* C. & N. W. R'y Co. Bond for removal to U. S. circuit court. Filed March 7th, 1884. P. D. Ankeny, clerk, by L. A. Wilkinson, *clerk*. N. M. Hubbard & Whiting S. Clark, def't's att'ys.

Petition for Removal to the Circuit Court of the United States, Southern District of Iowa, Central Division.

In the Circuit Court of Polk County, State of Iowa.

GUS. B. OHLE *against* THE CHICAGO & NORTHWESTERN R'Y CO.

To said circuit court:

Your petitioner respectfully shows to this honorable court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars; that the controversy in said suit is between citizens of different
32 States, and that the petitioner was at and before the time this suit was commenced, and at all times since has been and still is, a corporation duly organized and existing under and by virtue of the laws of the State of Illinois and a citizen of said State, with its principal place of business in said State of Illinois, and that your petitioner has never been organized under the laws of Iowa, and never was, and is not now, a citizen of the State of Iowa; and that the plaintiff, Gus. B. Ohle, was at and before the time of bringing this suit, and at all times since has been and still is, a citizen of the State of Iowa and a resident thereof.

That the affidavit of H. C. Burt filed in this cause in support of def't's motion for a cost bond, so far as the same alleged that the pl'ff was a non-resident of Iowa, was based upon the plaintiff's allegations in his petition herein, which defendant did not then
33 know to be untrue; but since said affidavit was filed herein defendant has learned that the plaintiff's allegations in his petition as to his being a resident & citizen of the State of Illinois are in fact wholly untrue; and that the plaintiff, at and before the time of bringing this suit, was not, and is not now, and never has been, a citizen or resident of the State of Illinois.

And your petitioner offers herewith a bond with good and sufficient surety for his entering in said circuit court of the United States on the first day of its next session a copy of the record in this suit and for paying all costs that may be awarded by said circuit court of the United States, if said court shall hold that this suit was wrongfully and improperly removed thereto.

And your petitioner prays this honorable court to proceed no further herein, except to make the order of removal required by
34 law, and to accept the said surety and bond, and to cause the record herein to be removed into said circuit court of the United States in and for the southern district of Iowa, central division. And petitioner will ever pray.

N. M. HUBBARD &
WHITING S. CLARK,
Att'ys for Petitioner.

STATE OF IOWA, } ss:
Polk County, }

I, N. M. Hubbard, being sworn, on oath say that I am attorney for the Chicago and Northwestern Railway Company, the petitioner above named; that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true, as I verily believe.

N. M. HUBBARD.

Subscribed by the said N. M. Hubbard in my presence and by him sworn to before me, this 19th day of March, 1884.

[Notarial seal.] JOHN D. JORDAN,
Notary Public, Polk Co., Iowa.

35 (Endorsed:) C. C. Polk Co., Ia. Gus. B. Ohle *vs.* C. & N. W. R'y Co. Pet. for removal. Filed March 21st, 1884. P. D. Ankeny, clerk, by L. A. Wilkinson, deputy. N. M. Hubbard & Whiting S. Clark, def'ts' att'ys.

Bond.

Know all men by these presents, That the Chicago & Northwestern R'y Co., as principal, and J. J. Smart, as sureti*es*, are held and firmly bound unto Gus. B. Ohle in the penal sum of two hundred and fifty dollars, for the payment whereof well and truly to be made unto the said Gus. B. Ohle, his heirs, representatives, and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents.

Yet upon these conditions: The said Chicago & Northwestern R'y Co. having petitioned the circuit court of Polk county,
36 State of Iowa, for the removal of a certain cause therein pending, wherein said Gus B. Ohle is plaintiff and said Chicago & Northwestern R'y Co. is defendant, to the circuit court of the United States in and for the southern [district] of Iowa, central division, now if the said Chicago & Northwestern R'y Co., your petitioner, shall enter in the said circuit court of the United States on the first day of its next session copies of all process, pleadings, depositions, testimony, and other proceedings in said cause, and shall pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise, in full force and virtue.

Witness our hands and seals, this 21st day of March, A. D. 1884.

THE CHICAGO & NORTHWESTERN R'Y CO.,
By its Att'y, WHITING S. CLARK.
J. J. SMART.

37 STATE OF IOWA, } ss:
Polk County, }

I, J. J. Smart, of said county, the surety named in the foregoing bond, being duly sworn, do depose and say that I am a resident of

the State of Iowa; that I am worth the sum of five hundred dollars beyond the amount of my debts; that I have property in the State of Iowa liable to execution equal to the sum of five hundred dollars.

J. J. SMART.

Subscribed and sworn to before me, this 21st day of March, 1884.

[Notarial seal.] C. M. SHERMAN,
Notary Public, Polk Co., Iowa.

(Endorsed:) Filed March 21st, 1884. P. D. Ankeny, clerk, by L. A. Wilkinson, deputy.

38 *Transcript of Judgment.*

STATE OF IOWA, } ss:
Polk County, }

Be it remembered that at a term of the circuit court, within and for the county and State aforesaid, begun and holden at the court-house in Des Moines on the 2d day of January, A. D. 1884, Hon. Josiah Given and Wm. Connor, sole judges in and for the 1st circuit, 5th judicial district of said State, presiding, on the 3rd day of said term, it being the 4th day of January, A. D. 1884, among other, the following proceedings were had, done, and entered of record, to wit:

Journal 16, *Page* 570.

GUS. B. OHLE *vs.* C. & N. W. R. R. Co.

CONNOR, J.:

Motion to strike application for cost bond is overruled, to which plaintiff excepts, and pl'ff is granted twenty days time in
39 which to file counter affidavits.

Transcript of Judgment.

STATE OF IOWA, } ss:
Polk County, }

Be it remembered that at a term of the circuit court within and for the county and State aforesaid, begun and holden at the court-house in Des Moines, on the 2d day of January, A. D. 1884, Hon. Josiah Given and Wm. Connor, sole judges of said court, in and for the 1st circuit, 5th judicial district of said State, presiding, on the 22nd day of said term, it being the 26th day of January, A. D. 1884, among other, the following proceedings were had, done, and entered of record, to wit:

Journal 17, *Page* 22.

GUS. B. OHLE *vs.* THE CHICAGO & NORTHWESTERN R'Y CO.

CONNOR, J.:

40 Upon the hearing and consideration of the defendant's motion to require plaintiff to give security for costs, the court

being fully advised sustains the motion, and plaintiff is required to give bond surety, justifying in the sum of $250, within ten days, and defendant is granted ten days aftey notice to answer.

Journal 17, *Page* 57.

Feb. 2d, 1884.

GUS. B. OHLE *vs.* CHICAGO & NORTHWESTERN R'Y CO.

CONNOR, J.:

The bond heretofore filed for security for costs as by the court disapproved because it limits in the affidavit the liability of the surety to $125.00, when it should be given for the payment of all costs which may accrue in this action in this ourt or in any other to which it may be carried, either to the defendant or to the officers of the court.

41 *Journal* 17, *Page* 89.

Feb. 9th, 1884.

GUS. B. OHLE *vs.* THE C. & N. W. R'Y CO.

CONNOR, J.:

Upon consideration of motion to reject cost bond, the court, being fully advised, overrules the motion, to which defendant excepts.

Journal 17, *Page* 113.

Feb. 16th, 1884.

GUS. B. OHLE *vs.* C. & N. W. R. R. CO.

Defendant withdraws demurrer to petition.

Journal 17, *Page* 138.

Feb. 23d, 1884.

GUS. B. OHLE *vs.* C. & N. W. R. R. CO.

GIVEN, J.:

Upon consideration of the demurrer of defendant to the amended petition of plaintiff, the court, being fully advised, overrules
42 the demurrer, to which defendant excepts. Defendant is granted five days to answer.

Journal 17, *Page* 214.

M'ch 15th, 1884.

GUS. B. OHLE *vs.* C. & N. W. R. R. CO.

GIVEN, J.:

This cause being on for hearing on the petition of defendant for a removal of this cause to the Federal court, the court, being fully advised, refuses to order the removal of this cause, to which defendant excepts.

Journal 17, *Page* 240.

M'ch 27th, 1884.

GUS. B. OHLE *vs.* C. & N. W. R'Y CO.

CONNOR, J.:

Upon consideration of defendant's petition for a removal of this cause to the Federal court, the court, being fully advised, overrules the motion for removal, to which defendant excepts.

Costs, $18.65.

43 STATE OF IOWA, } *ss:*
Polk County, }

I, P. D. ANKENY, clerk of the circuit court within and for the county and State aforesaid, do hereby certify the foregoing to be a full, true, correct, and complete copy of the original papers, costs, and judgment docket entrys in the above-entitled cause, as rendered by said circuit court at the January term, A. D. 1884—as full, true, correct, and complete as the same remains of record in my office.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court this 9th day of April, A. D. 1884.

[SEAL.] (Signed) P. D. ANKENY,
Clerk of said Court.

(Endorsed:) 3122 Law. Filed May 13th, 1884. E. R. Mason, clerk.

44 And on the 14th day of May, 1884, the plaintiff, by Bryan and Bryan, his attorneys, filed in said cause a motion to remand, which said motion is in the words and figures following, to wit:

45 In U. S. Cir. C't, Cen. Div., S. Dist., Iowa.

GUS. B. OHLE, *Pl'ff,* }
vs.
C. & N. W. R'Y CO., *Def't.* }

The pl'ff moves the court to remand this cause to the State court, because—

1. The same is here irregularly and unlawfully, the State court having overruled or refused to grant def't's petition for removal.

2. The record shows that at the time this action was begun the pl'ff was a citizen of the State of Ills.

3. The def't demanded and accepted a bond for costs from pl'ff in the State court on the ground that he was a citizen of Ills., where he sued, and has not relinquished under said bond, and has appealed this cause to the Sup. C't of Ia., and claiming that the State court shall dismiss the action because the pl'ff should have given a bond for costs, being a citizen of Ill., and failed to do so.

46 Pl'ff files, as a part of this motion, def't's abstract of record of said cause in the Sup. C't of Iowa.

(Signed) BRYAN AND BRYAN,
Att'ys for Pl'ff.

(Endorsed:) No. 3122 Law. Gus. B. Ohle *vs.* C. & N. W. R'y Co. Motion to remand. Filed May 14th, 1884. Ed. R. Mason, clerk. Bryan.

47 And on the 22d day of May, 1884, in the record of the proceedings in said court is an entry in said cause in the words and figures following, to wit:

48 United States Circuit Court, Southern District of Iowa, Central Division. May Term, 1884.

GUS. B. OHLE
vs.
CHICAGO AND NORTHWESTERN RAILWAY COMPANY. } No. 3122. Law.

THURSDAY, *May* 22, 1884.

This cause coming on this day for hearing, it was ordered that plaintiff have leave to file a plea in abatement herein.

49 And on the 23rd day of May, 1884, in the record of the proceedings in said court is an entry in said cause in the words and figures following, to wit:

50 United States Circuit Court, Southern District of Iowa, Central Division. May Term, 1884.

GUS. B. OHLE
vs.
CHICAGO AND NORTHWESTERN RAILWAY COMPANY. } No. 3122. Law.

FRIDAY, *May* 23, 1884.

This cause coming on this day for hearing, it was ordered that plaintiff have leave to withdraw his motion to remand this cause to the State court, filed herein. It was further ordered that plaintiff have leave to take the record attached to said motion to remand from the files of this cause.

51 And on the 29th day of August, 1884, the plaintiff, by Bryan & Bryan, his attorneys, filed in said cause a plea to the jurisdiction; which said plea is in the words and figures following, to wit:

52 United States Circuit Court, Southern District of Iowa, Central Division.

GUS. B. OHLE, Pl'ff, *vs.* THE C. & N. W. R'Y CO., Def't.

1. Comes now the said pl'ff and says that this honorable court has no jurisdiction to try and determine this cause, because the controversy herein is between citizens of the same State; that at the time this action was begun in the circuit court of the State of Iowa in and for Polk Co., and at the time the def't filed his petition in said State court for the removal of this case to this court, the pl'ff and def't were both citizens of the State of Illinois, and this he is ready to verify.

2. The pl'ff further says that this court has no jurisdiction
53 to try and determine the controversy herein and the def't ought not to be allowed to deny that at the time of the commencement of this action the pl'ff was a citizen of the same State as the def't, viz., the State of Ill., because when this case was pending in the circuit court of Polk Co., Ia., the said *said* State court having full jurisdiction of the parties to said action and the subject matter thereof, the def't filed a motion in said State court, supported by affidavit, to require pl'ff to give bond and surety for costs as required by section 2927 of the code of Iowa, on the ground that pl'ff was at the instituting of this action, and then was, a citizen of the State of Illinois; that the def't's said motion was sustained by court, and said court thereby adjudicated in favor of the def't; that pl'ff was a citizen of Ill. at the time aforesaid, and required
54 the pl'ff to give such bond and security that said adjudication is in full force and effect, and no appeal therefrom has been taken, all of which will appear by the record on file in this case, which is hereby referred to and made a part hereof.

3d. The pl'ff further says that this court ought not to assume jurisdiction of this cause, and the def't ought not to be allowed to remove the same to this court, because the said def't did, when this cause was pending in the State court of Iowa, make oath that the pl'ff herein was at the time of the commencement of *of* this action, and at that time, a non-resident of Iowa, and a citizen of Ills., and for that reason asks the said State court to require the pl'ff to give bond and security for costs under section 2927 of the code of Iowa; that upon such application of the def't the said State court ordered the pl'ff to give such bond and security, which the pl'ff accordingly did, and the said order and the said obligation is still in force,
55 and the def't still insists upon said obligation, and has moved the State court to dismiss this suit on account of an alleged defect in the form of said bond, which motion the said State court refused to sustain, from which ruling the def't has appealed to the supreme court of Iowa, where this cause is now pending, and the def't is now insisting in said supreme court of Iowa on the full force of pl'ff's obligation to give said bond and security for costs, and *and* that because the pl'ff- bond is defective this action should be dismissed, and at the same time the def't insists upon its right to remove this cause to this court, and to have the same tried therein, because the pl'ff, as def't alleges, was, when this suit was begun, and ever since has been, a resident and citizen of Iowa; that by reason of said facts the def't is estopped from asserting in this cause; that this court has jurisdiction of the same, or that the pl'ff, when
56 this suit was begun, or at any time since, was a citizen of the State of Iowa. A copy of the record of the Sup. C't of I'a, in said cause, is hereto attached and made part of the 3 & 4 divisions hereof.

4th. The pl'ff further says that this court has no jurisdiction to try and determine this cause, because the same was commenced in the circuit court of Polk Co., Ia., and the said court had complete jurisdiction thereof; that the def't made application in said State

court for the removal of this case to this court, which was overruled, to which ruling the def't submitted and filed an amended application, which was also overruled. From the ruling of the court on said amended application the def't appealed to the supreme court of Iowa, as appears from the record herein, where the same is still pending, and from the decision and judgment of which an appeal lies to the Supreme Court of the United
57 States; that the said Sup. Ct. of the U. S. alone has the power to overrule the decision of the Sup. Ct. of Iowa; that by reason of the said facts this case is not properly in this court. Wherefore pl'ff asks that this cause be stricken from the docket or remanded as this court may deem proper.

(S'g'd) BRYAN AND BRYAN,
Att'ys for Pl'ff.

58 *Appellant's Abstract of Record.*

In the Supreme Court of Iowa. June Term, 1884.

GUS. B. OHLE, Appellee,
vs.
THE CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

Appeal from Polk Circuit Court.

N. M. Hubbard and Whiting S. Clark, for appellant; Bryan and Bryan, for appellee.

On the 19th day of November, 1883, the plaintiff filed in the clerk's office of Polk circuit court his petition, setting forth that the said plaintiff alleges that he now is and for a long time has been a resident and citizen of the State of Illinois and the defendant now is and has long been a citizen and resident of the same State, and claiming damages in the sum of $20,000 for a personal injury received by him about the middle of April, 1880, as an
59 employe of defendant while at work on its gravel train, through the negligence of defendant's employes in charge of said train.

That the plaintiff further says, that prior to the September term of this court in 1881 he, being then a minor, commenced an action in this court by his next friend, Charles Ohle, against the defendant, to recover for the wrongs and injuries aforesaid, and said cause was removed to the United States circuit court at Des Moines, in the central division of the southern district of Iowa, and the plaintiff having attained his majority in April, 1883, the said United States circuit court, at the October term in 1883, substituted this plaintiff as plaintiff in his own name and right, and ordered said cause further prosecuted in plaintiff's name; and at the said October
59*a* term the said United States circuit court ordered said cause dismissed without prejudice on motion of the plaintiff.

And by amendment subsequently filed, the plaintiff further alleged: And after this plaintiff was substituted as sole plaintiff in his own name and right in said action, as stated in his petition, he pre-

pared for the trial thereof, and at the October term, 1883, of said United States court, the said cause was so far tried as to submit the evidence therein, and arguments of counsel and charge of the court to a jury, who retired to consider their verdict, and, failing to agree, were discharged by said United States court; that the plaintiff did not fail in said action in said United States court, and the same was not dismissed because of any negligence on the part of plaintiff in the prosecution thereof; that the same could not again be tried by said United States court until the May term, 1884, and nothing further was required of the plaintiff in said cause, or could have
59b been required, until the said May term; that after the said trial plaintiff was fully satisfied that he had not been able, and never would be able, to obtain a fair trial to an impartial jury in said United States court.

On the 2d day of January, 1884, defendant filed, before answering, the following:

60 *Affidavits and Motion.*

I, H. G. Burt, being first duly sworn on oath, say: That I am the superintendent of the Iowa Division of the Chicago & Northwestern Railway Company, which includes the main line from Clinton, Iowa, to Council Bluffs, Iowa, together with several branches. That I am acquainted with the facts in regard to the injury of Gus. B. Ohle, for which the above suit is brought, and the defendant has a good defense to the entire claim made by the plaintiff in said cause, and that the plaintiff is a non-resident of the State of Iowa, as he claims in his petition in this case and as I believe.

H. G. BURT,
Superintendent Iowa Division.

Duly verified.

61 I, N. M. Hubbard, being first duly sworn on oath, say: That I am the attorney for the defendant in the above-entitled cause. That the cause has been once tried in the Federal court at Des Moines during the month of October, 1883, and that on said trial over twenty witnesses were examined, including several medical witnesses. The probable costs of the trial of this case in this court, together with the costs of the Supreme Court in case the same should be appealed, will be, as I believe, about the sum of five to eight hundred dollars.

N. M. HUBBARD.

Duly verified.

Upon the foregoing affidavits of H. G. Burt and N. M. Hubbard the defendant now moves the court to require the plaintiff to give bond in the sum of fifteen hundred dollars, with a sufficient
62 surety to be approved by the clerk for the payment of all costs which may accrue in the action in the court in which it is brought, or in any other to which it may be carried, either to the defendant or to the officers of the court.

On January 26th, 1884, plaintiff filed the following affidavit:

I, J. P. Gad. Bryan, being sworn, say: That I am attorney for plaintiff in said cause, and have had the entire charge thereof; that the same was originally commenced in this court and transferred to the Federal court, and defendant made a motion in said Federal court to require plaintiff to secure costs therein, and the plaintiff was excused therefrom by reason of his inability to give said security.

That this cause was pending a long time in said Federal court, and was tried at the October term thereof in 1883, and the jury disagreed, and the taxed costs in said Federal court for which
63 defendant is liable was only $118.65, as shown by a slip hereunto attached given affiant by the deputy clerk of said Federal court, and fees are higher in said Federal court than in this court.

Affiant further says: That he conducted said trial in the Federal court for the plaintiff, and that he believes defendant has no honest defense to plaintiff's right to recover in this action, and that its pretended defense is false and is not founded on truth. Affiant further says: That plaintiff is poor, and an order of this court requiring him to give a large bond for costs would substantially be a denial of justice, and that the foregoing affidavit has been read over by affiant and is true, as he verily believes.

P. GAD. BRYAN.

Duly verified.

64 On the 26th day of January, 1884, the court sustained defendant's motion for cost bond, and required plaintiff to give bond surety justifying in $250 within ten days.

On the 29th day of January, 1884, plaintiff filed herein the following as a cost bond, to wit:

Know all men by these presents, that we, Gus. B. Ohle as principal and J. M. Knox as surety, are held and firmly bound unto P. D. Ankeny, clerk of the circuit court of Iowa in and for the county of Polk, in the penal sum of —— dollars, for the payment of which well and truly to be made we bind ourselves firmly by these presents. The conditions of this obligation are such that whereas the above-bounden Gus. B. Ohle did, on the — day of ——, 1883, institute an action in the circuit court, State of Iowa, of Polk county, against the Chicago & Northwestern Railway Company, and said defendant, having filed an affidavit stating that the plaintiff
65 is a non-resident of Iowa and that it has a good defense to said action, and whereas said court has made an order for the plaintiff in said action to furnish security for costs. Now, if the said Gus. B. Ohle shall pay unto the said Chicago & Northwestern Railroad Company, defendant, or to the officers of said court all the costs that may be adjudged against him in said action in said court, or in any other court to which the same may be carried, then this obligation shall be void; otherwise, in full force.

Witness our hands, this 28th day of January, 1884.

GUS. B. OHLE, *Principal.*
By BRYAN AND BRYAN, *His Attorneys.*
J. M. KNOX, *Surety.*

STATE OF IOWA, } ss:
Polk County, }

I, J. M. Knox, being first duly sworn, depose and say: That I am a resident of the State of Iowa; that I am surety on the fore-
66 going bond; that I am worth the sum of $250; that being double the sum hereby secured beyond my debts; that I have property in the State of Iowa liable to execution of the value of more than $250.

J. M. KNOX.

Duly verified.

And upon hearing thereon by the court on the 2d day of February, 1884, the court ordered that the bond is disapproved because it limits in the affidavit the liability of the surety to $125, when it should be given (quoting the statute) for the payment of all costs which may accrue in the action in the court in which it is brought, or in any other to which it may be carried, either to the defendant or to the officers of the court.

On the 4th day of February, 1884, plaintiff filed herein, as an amended cost bond, a bond the same in form as the one already set forth herein, except the omission from the affidavit
67 of the surety of the words, "that being double the sum hereby secured," and as in said former bond, no penal sum being stated, but the place or blank therefor being unfilled, the same being signed by the same surety.

On the 6th day of February, 1884, defendant filed herein the following motion:

Defendants move the court to disapprove and reject the cost bond filed herein by plaintiff as an amended bond as defective and insufficient, and strike the same from the files, because the surety therein is bound by no obligation or sum therein.

2. To dismiss said action for want of cost bond as ordered.

On the 9th day of February, 1884, upon hearing by the court, on said motion the court overruled the same, to which ruling defendant at the time excepted.

On the 28th day of February, 1884, defendant filed herein
68 its answer, consisting of a general denial, and second count, a plea of the statute of limitations.

Third Count.

For further answer and defense defendant says: That said action is brought and based on section 1307 of the Code of Iowa, which is repugnant to and in violation to section 1 of the Fourteenth Amendment to the Constitution of the United States, and that plaintiff received his alleged injuries by reason of the negligence of a coemploye. Wherefore defendant asks judgment for costs.

On February 29th, 1884, plaintiff filed motion to strike out said third count of defendant's answer, because the said third division presents no issue of fact to be tried, but raises an unmixed question

of law that clearly appears on the face of the petition, and could have been tried on demurrer.

69 On March 1, 1884, upon hearing thereof, the court sustained plaintiff's motion to strike out said third count, to which ruling defendant at the time excepted.

On the 7th day of March, 1884, the defendant filed the following petition and bond for removal to the United States court:

Petition for Removal to the Circuit Court of the United States, Southern District of Iowa, Central Division.

In the Circuit Court of Polk County, State of Iowa.

GUS. B. OHLE *vs.* THE CHICAGO & NORTHWESTERN RAILWAY COMPANY.

To said circuit court:

Your petitioner respectfully shows to this honorable court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars; 70 that the controversy in said suit is between citizens of different States, and that the petitioner was, at and before the time this suit was commenced, and at all times since has been and still is, a corporation duly organized and existing under and by virtue of the laws of the State of Illinois and a citizen of said State, with its principal place of business in said State of Illinois, and that your petitioner has never been organized under the laws of Iowa, and never was, and is not now, a citizen of the State of Iowa; and that the plaintiff, Gus. B. Ohle, was at and before the time of bringing this suit, and at all times since has been and still is, a citizen of the State of Iowa and a resident thereof; and your petitioner offers herewith a bond and sufficient surety for his entering in said circuit court of the United States on the first day of its next session 71 a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court of the United States, if said court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioner prays this honorable court to proceed no further herein except to make the order of removal as required by law, and to accept the said surety and bond, and to cause the record herein to be removed to said circuit court of the United States in and for the southern district of Iowa, central division.

And petitioner will ever pray.

WHITING S. CLARK,
Attorney for Petitioner.

STATE OF IOWA, } ss:
Polk County, }

I, N. M. Hubbard, being duly sworn, on oath say: That I am attorney for The Chicago & Northwestern Railway Company, the 72 petitioner above named; that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true, as I believe.

Duly verified. N. M. HUBBARD.

Bond.

Know all men by these presents that the Chicago & Northwestern Railway Company, as principal, and J. J. Smart, as surety, are held and firmly bound unto Gus. B. Ohle in the penal sum of two hundred and fifty dollars; for the payment whereof, well and truly to be made unto the said Gus. B. Ohle, his heirs, representatives, and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents.

Yet upon these conditions: The said Chicago & Northwestern Railway Company having petitioned the circuit court of Polk
73 county, State of Iowa, for the removal of a certain cause therein pending, wherein said Gus. B. Ohle, plaintiff, and said Chicago & Northwestern Railway Company, defendant, to the circuit court of the United States in and for the southern district of Iowa, central division:

Now, if said Chicago & Northwestern Railway Company, your petitioner, shall enter in the said circuit court of the United States, on the first day of its next session, copies of all process, pleadings, depositions, testimony, and other proceedings in said cause, and shall pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this 5th day of March, A. D. 1884.

THE CHICAGO & NORTHWESTERN R'Y CO.,
By WHITING S. CLARK, *Its Attorney.*
J. J. SMART.

74 STATE OF IOWA, }
Polk County, } *ss:*

I, J. J. Smart, of said county, the surety named in the foregoing bond, being duly sworn, do depose and say: That I am a resident of the State of Iowa; that I am worth the sum of five hundred dollars beyond the amount of my debts; that I have property in the State of Iowa liable to execution equal to the sum of five hundred dollars.

J. J. SMART.

Subscribed and sworn to before me this 5th day of March, A. D. 1884.

JOHN D. JORDAN,
Notary Public, Polk County, Iowa.

On March 8, 1884, on hearing on said petition for removal, the court ordered said petition dismissed and the removal refused; to which ruling and order defendant at the time excepted.

75 On the 21st day of March, 1884, defendant filed an amended petition for removal of said cause to the United States circuit court, with the same allegations and verification as the former petition, and with the following additional allegations in said petition: That the affidavit of H. G. Burt, filed in this cause in support of defendant's motion for a cost bond, so far as the same alleged that

the plaintiff was a non-resident of Iowa, was based upon the plaintiff's allegations in his petition herein, which defendant did not then know to be untrue; but since said affidavit was filed herein defendant has learned that the plaintiff's allegations in his petitions, as to his being a resident and citizen of the State of Illinois, are in fact wholly untrue; and that the plaintiff, at and before the time of bringing this suit, was not, and is not now, and never has been, a citizen or resident of the State of Illinois.

76 Defendant also filed with said amended petition for removal another bond, the same in form, with the same surety and justification as the former bond for removal as herein set forth.

No objection was made to the sufficiency of the bond on either petition for removal.

Upon hearing thereof on the 27th day of March, 1884, the court overruled said petition and refused the removal; to which ruling and order the defendant at the time excepted. And on the 10th day of April, 1884, defendant perfected an appeal to the supreme court of Iowa from the ruling and order of the court overruling defendant's motion to reject said amended cost bond and dismiss said action, and from the rulings and orders of the court denying said petitions for removal to the Federal court, and dismissing the same by service of written notice thereof on plaintiff's attorneys

77 and on the clerk of Polk circuit court.

Defendant's Assignment of Errors.

1. The court erred in overruling defendant's motion to reject and disapprove said cost bond as amended.

2. The court erred in not rejecting and disapproving said cost bond as amended.

3. The court erred in overruling defendant's motion to dismiss said action for want of a cost bond.

4. The court erred in not dismissing said action for want of a cost bond.

5. The court erred in dismissing defendant's first petition for removal of the action to the United States circuit court.

6. The court erred in denying the removal of said action to the United States court upon defendant's first petition therefor.

7. The court erred in overruling defendant's petition for removal of said cause to the United States circuit court on defendant's petition therefor as amended.

78 The court erred in not ordering the removal of said cause as prayed in defendant's petition therefor as amended.

9. The court erred in sustaining plaintiff's motion to strike — the third count of defendant's answer.

79 *Defendant's Brief.*

In the Supreme Court of Iowa. June Term, 1884.

GUS. B. OHLE, Appellee,

vs.

THE C. & N. W. RAILWAY COMPANY, Appellant.

Appeal from Polk circuit court.

N. M. Hubbard and Whiting S. Clark, for appellant, Bryan and Bryan, for appellee.

I.

The first question presented by the appeal is the sufficiency of the so-called cost bond as amended, without any penal sum or obligation therein.

The so-called cost bond was as follows, viz., Ab., p. 4:

Know all men by these presents, That we, Gus. B. Ohle, as principal, and J. M. Knox, as surety, are held and firmly bound unto P. D. Ankeny, clerk of the circuit court Iowa in and for the county of Polk, in the penal sum of —— dollars, for the payment of
80 which well and truly to be made we bind ourselves firmly by these presents.

The conditions were that if said Ohle should pay all the costs adjudged against him in this action then this obligation to be void; otherwise in full force. The objection to the bond was, that there was no penal sum or obligation in the so-called bond to be in force in case the condition was not fulfilled. The vital part of the bond was wanting, and left no obligation on the party in any event. There was, in fact, no bond.

This is apparently self-evident and hardly capable of argument. The authorities fully sustain defendant's position:

"The obligation is a deed wherein a man binds himself under a penalty to do a thing."

Com. Dig., Obligation A.

"In every obligation there must be an obligor, an obligee, and a sum in which he is bound."

Com. Dig., Obligation A.
Perk. Fuit, 119.
Yel., 194.

81 "If he be bound *in libris*, without saying how many, 'the obligation is void.

Com. Dig., Obligation B. 5.
R. Yel., 225

In Perry *vs.* Denson, 1 G. Gr., 467, this court expressly held that judgment against a surety for costs could not exceed the penalty of the bond.

In the case in hand there is no penalty, and it follows that there is no security whatever for costs.

The so-called bond should therefore have been rejected by the court below and the court erred in not rejecting it.

2. The court below should have dismissed the action upon the failure to fill the required bond.

Section 2927 of the code provides that if a defendant shall at any time before answering make and file an affidavit stating that he has a good defense in whole or in part, the plaintiff if he
82 be a non-resident of this State * * * before any other proceeding in the cause shall file in the clerk's office a bond with a sufficient surety, to be approved by the clerk, for the payment of all costs which may accrue in the action in the court in which it is brought or in any other to which it may be carried either to the defendant or to the officers of the court.

The defendant's motion for the bond was filed before answering to the action, as required by the statute. The bond was duly ordered by the court and time given to file the same (Ab., p. 4). No more time was asked. The time given will be deemed sufficient unless facts showing the contrary appear.

D. M. V. L. S. Co. *vs.* Henderson, 38 Iowa, 449.

The required bond was not filed; the case was ripe for dis-
83 missal, and it was the defendant's unquestionable right to have it dismissed without being compelled to defend further. The plaintiff came into court professedly as a non-resident, and failing to file the required bond, had no right to proceed further. This is expressly provided by section 2928 of the code, as follows, to wit:

An action in which a bond for costs is required by the last section shall be dismissed if bond is not given in such time as the court may allow. Further argument on this question is needless.

II.

The third count of defendant's answer was as follows: For further answer and defense, defendant says that said action is brought and based on section 1307 of the code of Iowa, which is repugnant to and in violation of section 1 of the Fourteenth Amendment
84 to the Constitution of the United States, and the plaintiff received his alleged injuries by reason of the neligence of a co-employe.

Plaintiff moved to strike out said third count, because—

The said third division presents no issue of fact to be tried, but raises an unmixed question of law that clearly appears on the face of the petition and could have been tried on demurrer.

The court will observe that there is no pretense that this third count is immaterial or irrelevant. It is not a question here on the objection made, whether the defense presented in this count is sufficient in law, and we shall not discuss that question. The ruling of the court below to strike out this count is to be tested solely by the sufficiency of the objection made for that purpose raised below. By pointing out a specific objection, the plaintiff is deemed to have waived others if others there be.

85 The D. M. V. L. S. Ins. Co. *vs.* Henderson, 38 Iowa, 450.

But the only cause for which an answer may be struck out is that it is a sham or irrelevant answer.

Section 2707 of the Code covers this as follows, viz:

Sham and irrelevant answers and defenses may be stricken out, on motion, upon such terms as it may impose.

"*Expressio unius est exclusio alterius.*"

There is no pretense that this third count is a sham or irrelevant defense.

The plaintiff's remedy, if any, was to demur, and the objection, as he states, might perhaps have been *been* sufficient to have sustained a demurrer, even though the third count presented a valid defense, if the def't should have presented this defense by a demurrer to the petition. We need not discuss the question here whether this defense could only be presented by a demurrer to the petition.

86 The plaintiff did not demur to it, and in no case can it be proper to strike it out, except because it is a sham or irrelevant defense, and there is no pretense that it is that.

III.

The defendant also subsequently filed a petition and bond for removal of the cause to the Federal court. (Ab., pp. 6 and 7.) The court denied the removal and ordered the petition dismissed. Subsequently defendant filed an amended petition for removal, with the additional allegations, to wit:

That the affidavit of H. G. Burt, filed in this cause in support of defendant's motion for a cost bond, so far as the same alleged that the plaintiff was a non-resident of Iowa, was based upon the plaintiff's allegations in his petition herein, which defendant did not then know to be untrue, but since said affidavit was filed

87 herein defendant has learned that the plaintiff's allegations as to his being a resident and citizen of the State of Illinois are in fact wholly untrue, and that plaintiff, at and before the time of bringing this suit, was not and is not now and never has been a citizen or resident of the State of Illinois.

The court also denied this petition and refused the removal. Both the petitions for removal contained the usual allegations as to the amount in controversy and the citizenship of the parties; that the amount in controversy was more than $500; that the defendant, at and before the commencement of the action, was, and now is, and at all times has been, a citizen of the State of Illinois, and never of the State of Iowa; that the plaintiff, at and before the commencement of the action, was, and now is, a citizen of

88 the State of Iowa—allegations sufficient, beyond a question, to give the Federal court jurisdiction and authorize the removal of the cause. Both petitions also were verified.

No objections were filed by the plaintiff to either petition and no evidence was introduced thereon.

No objection was made by the plaintiff to the bond filed with each petition, and the bond in each instance was in the usual and sufficient form, with a sufficient surety, with the usual justification. We claim that it was error in each instance for the court below to deny each petition and refuse the removal on each.

This is a case the court will observe where, after dismissing a former pending case in the Federal court, the fertile counsel has colorably exported his client to avoid the Federal court juris-
89 diction—an expedient which the ingenious counsel boasts of to newspaper interviewers.

Strange and unaccountable as it is to say, if there is any ground on which the plaintiff's counsel will undertake to justify the action of the court below, it is this: That after the plaintiff had filed his petition, affirming that he was a resident and citizen of Illinois, the defendant then not knowing to the contrary, but relying on what the plaintiff alleged, adopted in the affidavit of (Burt Ab., p. 2,) what the plaintiff had said, "that the plaintiff is a non-resident of the State of Iowa, as he claims in his petition in this case, and as I believe. This portion of the affidavit was not pertinent or necessary to the question of a cost bond, in respect to which the affidavit was filed, but was wholly unnecessary.

90 The statute provides that if a defendant shall, at any time before answering, make and file an affidavit stating that he has a good defense in whole or in part, the plaintiff, if he be a non-resident of this State * * * shall file * * * a bond, with security, for costs.

So far as the question of a cost bond was concerned the fact that plaintiff was a non-resident of Iowa was already sufficiently established by the plaintiff's own allegations in his petition. Upon filing the affidavit as to a defense the defendant was entitled to a cost bond. The portion of the affidavit as to plaintiff's residence was wholly unnecessary, and at most was only the adoption of what the plaintiff said, and which defendant did not then know to be untrue.

Yet the most singular doctrine of estoppel ever heard of—*sui generis*—is now to be set up here: that the plaintiff himself having
91 misled the defendant as to the plaintiff's residence in Illinois, in a motion for a cost bond, the defendant cannot afterwards, in a petition for removal of the cause, which has no dependence or connection with the motion for the cost bond, gainsay or disown the falsehood of the plaintiff himself.

Argument is useless, if the mere statement of the question is not itself sufficient.

2. There being no objections filed to the petitions for removal and no evidence to the contrary, the allegations in the petitions for removal especially being verified must be taken to be true, and presented a proper case where the court below should have ordered the removal, and the court erred in not so doing, and in denying the petitions and refusing the removal.

There can be no question in the State court as to the re-
92 moval in such case.

The decisions of the Federal courts, the court where the sufficiency of a petition for removal is to be determined, go much further, and hold that the petition need not be verified, that the question is not a case for evidence in the State court to determine any contested facts; that if the allegations of the petition are sufficient to make a proper case for removal, and a proper bond is filed,

the order of removal should then be made by the State court, and that the petition operates *eo instante* to remove the cause, even if no order of removal is made or against an order denying a removal and the question of jurisdiction is to be thereafter determined in the Federal court as to any contested questions.

Denistown *vs.* Draper, 5 Blatch., 6338.
Fisk *vs.* U. P. R. R. Co., 6 Blatch., 362.
Hatch *vs.* C. R. I. & P. R. R., 6 Blatch., 105.
Fisk *vs.* U. P. R. R. Co., 8 Blatch., 243.
Heath *vs.* Austin, 12 Blatch., 320.
93 McKaye *vs.* Mallory, 19 Blatch., 170.
Kanouse *vs.* Martin, 15 How., 193.
Ins. Co. *vs.* Dunn, 19 Wal., 214.
Railway Co. *vs.* Ramsey, 22 Wal., 328.
R. R. *vs.* Mississippi, 102 U. S., 135.
R. R. *vs.* Koontz, 104 U. S., 5.

In Denistown *vs.* Draper, 5 Blatch., 338, Judge Nelson said:

In cases where the proceedings are in conformity with the act the removal is imperative both upon the State and circuit court, and if the facts are seriously contested it must be done in a formal manner by pleadings and proof in the latter court. The question of jurisdiction belongs to the Federal court, and must be heard and determined there.

In Hatch *vs.* The C. R. I. & P. R. R. Co., 6 Blatch., 117, Judge Blatchford said:

When the proper steps had been so taken (for removal) and evidence of their having been so taken presented to the State court it was the duty of the State court to accept the sureties
94 and proceed *no* in the causes.

In Fisk *vs.* U. P. R. R. Co., 8 Blatch., 247, Judge Nelson, with Judge Blatchford concurring, says:

The learned counsel for the plaintiff seem to suppose that the solicitor is entitled to notice of the time and place of the presenting the petition. But this an error. The act prescribes no such practice, and it is otherwise under all the previous statutes providing for removals. No affidavit can be read before the State court in opposition. The application on the petition is *ex parte*, and depends upon the papers upon which it is founded, and if they are regular and conform to the requirements of the statute the court has no discretion. The act is perem-tory.

In McKaye *vs.* Mallory, 19 Blatch, 175, where upon a matter vitally affecting the jurisdiction, the allegations of the petition for removal were in conflict with the answer of a defendant,
95 Judge Blatchford said on a motion to remand:

For the purposes of removal the removing party in the petition must at this stage of the case prevail, and the suit must for the present be retained by this court.

The Supreme Court of the United States has also determined the question in the same way.

In R. R. Co. *vs.* Mississippi, 102 U. S., 141, the court say:

It (the State court) was entirely without jurisdiction to proceed after the presentation of the petition and bond for removal.

In Railroad *vs.* Koontz, 104 U. S., 14, upon a review of the cases, the court say:

It is also a well-settled rule of decision in this court that when a sufficient case for removal is made in the State court the rightful jurisdiction of that court comes to an end, and no further pro-
96 ceedings can properly be had there unless in some form its jurisdiction is restored.

The provision of the act of 1875 is in this respect substantially the same as that of the 12th section of the judiciary act of 1789, and requires the State court, when the petition and a sufficient bond are presented, to proceed no further with the suit. * * *

The jurisdiction is changed when the removal is demanded in proper form and a case for removal made.

There is no pretense in this case that the removal is not demanded in proper form and a case for removal made in the defendant's petitions.

It is true there was a conflict between the allegations of the petition for removal and the plaintiff's petition as to the citizenship of the plaintiff—the petitions for removal alleging it to be in Iowa and the plaintiff's petition alleging it to be in Illinois; but no ob-
97 jections were filed against the petitions for removal. No evidence was ever offered by the plaintiff against the allegations in that respect. The petitions for removal were verified and the plaintiff's petition was not. And in any event we submit that under the authorities the conflict between the two was a question solely determinable in the Federal court, and the removal should have been ordered.

N. M. HUBBARD AND
WHITING S. CLARK,
Defendant's Attorneys.

98 *Brief for Appellee.*

In the Supreme Court of Iowa. June Term, 1884.

GUS. B. OHLE, Appellee, *vs.* THE C. & N. W. R'Y CO., Appellant.

Appeal from Polk circuit court.

N. M. Hubbard and Whiting S. Clark, for appellant; Bryan and Bryan, for appellee.

I.

Code, sec. 2927, does not require an obligation with a penalty, and a single bond is a compliance therewith.

Perry *vs.* Denson, 1 G. Green, 467, does not hold that a bond is void without a penalty, but only that a surety cannot be held for a sum greater than the penalty, where one is fixed.

II.

If the court were wrong in holding the bond to be good, it
99 was error without prejudice, because, by the defendant's own showing on oath, the plaintiff was a resident and citizen of Iowa, and no bond for costs could be required of him.

III.

There would have been no error in overruling the defendant's motion to dismiss, even if the bond had been held to be bad. It is provided by sec. 248 of the Code that no defective bond shall prejudice the party giving it, if it be rectified in a reasonable time after the defect is discovered.

If the bond had been held bad, the defendant must have been allowed a reasonable time thereafter to correct it.

IV.

The third count of defendant's answer presented no defense. The validity of the statute (Code, 1307) has been settled by this court. The count was clearly demurrable, and we think, under our practice, could have as well been stricken out. Evans *vs.* Rob-
100 bins, 29 Iowa, 472. At any rate the result is the same, and if technically wrong no one is prejudiced by it.

V.

The petition for a change of forum was properly denied.

The record shows that plaintiff was excused from giving bond in the Federal court on account of his poverty; and for the purpose of squeezing him out of the State court, one Burt, who never had anything to do with the case, was procured by defendant to swear that it had a good defense, and that plaintiff was a citizen of Illinois, and moved to require plaintiff to give a bond for costs.

This affidavit is reinforced by defendant's attorney to show that the bond ought to be a large one. Failing in this scheme, then comes the same attorney and swears that the plaintiff was then, ever since has been, and still is, a citizen of Iowa, and asks that the case may be sent to the Federal court.

101 The court denied the petition on the ground that the record showed that the plaintiff was at the commencement of the suit a citizen of the same State with the defendant. The court also held that to allow the defendant to procure a removal of the cause by contradicting its own oath, on which it procured of plaintiff a cost bond, would be to sanction a most reprehensible practice, which no court having any sense of right could tolerate.

We think the court correctly held, and that its judgment should be affirmed.

BRYAN AND BRYAN,
Attorneys for Plaintiff.

(Endorsed:) U. S. C. C. G. B. Ohle *vs.* C. & N. W. R'y Co. Plea to the jurisdiction. Filed Aug. 29th, 1884. Ed. R. Mason, clerk. Bryan and Bryan, for pl'ff.

102 And on the 4th day of October, 1884, the plaintiff, by Bryan and Bryan, his attorneys, filed in said cause a trial notice in the words and figures following, to wit:

103 *Notice of Trial.*

In the Circuit Court of the United States, Central Division, Southern District of Iowa.

GUS B. OHLE *vs.* THE CHICAGO & NORTHWESTERN R'Y CO.

To the clerk of said court:

You are hereby notified that the above-entitled cause will be for trial on issues of law and fact as to the jurisdiction of said court.

(S'g'd) BRYAN AND BRYAN,
Att'ys for Pl'ff.

(Endorsed:) 3122. Gus. B. Ohle *vs.* C. & N. W. R'y Co. Notice of trial. Filed Oct. 4, 1884. Ed. R. Mason, clerk. Bryan and Bryan, att'ys for pl'ff.

104 And on the 22d day of October, 1884, the defendant, by Chas. A. Clark, its attorney, filed in said cause a motion and affidavits for continuance in the words and figures following, to wit:

Motion and Affidavit for Continuance.

105 In the Circuit Court of the United States, Southern District of Iowa, Central Division.

GUS. B. OHLE
vs.
THE CHICAGO & NORTHWESTERN RAILWAY COMPANY.

The above-named defendant moves for a continuance of this case, and in support of its motion submits the annexed affidavits.

(S'g'd) CHAS. A. CLARK,
Att'y for Def't.

UNITED STATES OF AMERICA, }
Southern District of Iowa, } *ss:*

I, Chas. A. Clark, being duly sworn, depose and say: That I am in partnership with N. M. Hubbard, defendant's attorney in this case; that the said Hubbard has had charge of this suit and all litigation pertaining to plaintiff's claim against the defendant
106 from its inception up to the present time; that he tried a suit in this court brought by plaintiff upon the same cause of action as that set up in his petition herein, and on such trial the jury disagreed; that I know that the said Hubbard has devoted especial and particular attention to investigating the questions of law and fact involved in this case and in preparing himself to try the issues involved in this case at the present term of court; that I have had nothing to do with the case or claim of plaintiff against

the defendant from its inception up to the present time, and have not had occasion to investigate either the questions of law or fact involved in the litigation, and I am entirely unprepared to try the issues upon which the case is pending at the present term, and that my other professional engagements in this court and elsewhere during the *the* present term are such that it is impossible for
107 me to prepare to try or assist in the trial of the issues upon which the case is pending at this term.

That the said N. M. Hubbard, the defendant's attorney herein, has been for more than a month last past, and now is, suffering from physical disabilities which entirely unfit him for the transaction of any business, and have made it imperatively necessary for him to abstain from all business, and that he is now at Hot Springs, Arkansas, for the benefit of his health. I know that his family physician insists that said Hubbard must refrain from all business and professional cares for a considerable period of time in order to reëstablish his health; that since the illness of said Hubbard I have had so many other professional engagements demanding my attention from day to day that I have been unable to prepare for the
108 trial of this case at the present term of this court; that if the cause is continued, I believe either the said Hubbard or myself will be prepared to try the same at the next term of court.

(S'g'd) CHAS. A. CLARK.

Subscribed and sworn to before me by the said Chas. A. Clark, this 22d day of October, A. D. 1884.

[Notarial seal.] (S'g'd) JOHN D. JORDAN,
N. P., Polk Co., Io'a.

UNITED STATES OF AMERICA, } ss:
Southern District of Iowa, }

I, W. S. Clark, being duly sworn, depose and say: That I have been associated with N. M. Hubbard in looking after the interests and defense of the defendant in the above-entitled cause; and I further say that the said Hubbard has at all times had charge and control of the defense of this case, and I have taken no action in it, except under directions from him and after full consultation
109 and advice with him; that I am not prepared to try the issue pending in this case at the present term of court, and I believe the interests of the defendant require the presence of Judge Hubbard at the trial of such issues.

(S'g'd) WHITING S. CLARK.

Subscribed and sworn to before me, this 22d day of October, A. D. 1884.

[Notarial seal.] (S'g'd) JOHN D. JORDAN,
Notary Public, Polk Co., Iowa.

(Endorsed): No. 3122, law. Ohle *vs.* C. & N. W. R'y Co. Mo. and aff'ts for continuance. Filed Oct. 22d, 1884. Ed. R. Mason, clerk. Chas. A. Clark, for def't.

110 And on the 23rd day of October, 1884, the plaintiff, by Bryan and Bryan, his attorneys, filed in said cause an affidavit, in resistance to motion for continuance, in the words and figures following, to wit:

111 In the Circuit Court of the U. S. for the Central Division, Southern District of Iowa. Oct. Term, '84.

GUS. B. OHLE *vs.* THE C. & N. W. R'Y CO.

The pl'ff in said cause, resisting the def'ts application for a continuance, submits the following objections and the subjoined affidavit:

1. The affidavit of Chas. A. Clark shows no diligence. It shows that more than a month ago it was known that Judge Hubbard would not be able to attend this term of court, and it fails to show any efforts were made to prepare for trial.

2. The affidavit fails to give any assurance that Judge Hubbard will ever be able to appear.

3. The record on file in this case shows that Whiting S. Clark appeared for def't at every step of the proceeding in this cause

112 in the State circuit court and in the records of the supreme court of Iowa and in the argument of this cause in said supreme court, and no reason is given why he is not perfectly capable and ready to try the issues in this case.

(S'g'd) BRYAN & BRYAN,
Att'ys for Pl'ff.

STATE OF IOWA,)
Polk County,) *ss:*

I, P. Gad Bryan, being duly sworn, say: That I am a member of the firm of B. & B., att'ys for pl'ff in said cause; that I have had the sole charge of said cause in the circuit court of Polk Co., Ia., and in the supreme court of Ia., as well as in this court; that Col. Whiting S. Clark appeared for the def't in the State trial court in every step of the proceeding therein, and no other att'y ever appeared therein in person for def't. Said Clark filed a motion in said

113 State court to require said pl'ff to give a cost bond, upon the ground that pl'ff at the commencement of this suit was a citizen of Ills., based upon an affidavit of one H. G. Burt, superintendent of the Iowa div. of def'ts road, which motion was sustained and bond given, and amended because of objections filed thereto by said Clark; that said Clark then moved to dismiss said cause on account of alleged defects therein, which motion was overruled. The said Clark also filed an answer in said cause in said circuit court of Iowa, one division of which was stricken out; that after a part of said answer was stricken out the said Clark filed in said State court a pet. for removal, which was not allowed, and also an amended petition, which was not allowed, both based on an affidavit of N. M. Hubbard stating that pl'ff at the commencement of this suit was, and ever since had been, a resident and a citizen of Iowa; that

114 said Clark appealed from the order of said circuit court from the judgment thereof in refusing to dismiss this cause by rea-

son of alleged defects in said cost bond, and in striking out a portion of his answer, and in refusing to sustain his application for a removal to this court and assigned for error in the Iowa supreme court.

1. The overruling of def't's motion to reject said cost bond.
2. In not dismissing said cause for want of a cost bond.
3. In not sustaining def't's petition for removal.
4. In sustaining pl'ff's motion to strike out the third count of def't's answer, that the said Clark prepared the argument for def't in the said supreme court on said appeal, and that said cause was argued and fully submitted to the said supreme court at the June term thereof, 1884; that said Whiting S. Clark is the resident att'y for def't in the city of Des Moines, and is an able and ex-
115 perienced lawyer, and as affiant believes can fully protect the interests of the def't in the trial of said cause; and that a just determination of the questions of law and fact involved in this case can be determined without detriment to def't in the absence of Judge Hubbard; that as affiant believes the records in this case will disclose a purpose of def't to defeat this pl'ff's action by delays and by worrying the pl'ff out; and that great injustice would be done the pl'ff by postponing the trial of the questions involved herein to the May term of this court; and further this deponent saith not.

(S'g'd) P. GAD BRYAN.

Subscribed and sworn to before me by said P. Gad Bryan this 23rd day of October, 1884.

[SEAL.] (S'g'd) JOHN D. JORDAN,
Notary Public, Polk Co., Iowa.

116 (Endorsed:) Gus. B. Ohle *vs.* C. & N. W. R'y Co., aff., resisting app. for con. Filed Oct 23, 1884. Ed. R. Mason, clerk. Bryan & Bryan.

117 And on the 23d day of October, 1884, in the record of the proceedings of said court is an entry in said cause in the words and figures following, to wit:

118 United States Circuit Court, Southern District of Iowa, Central Division. October Term, 1884.

GUS. B. OHLE
vs.
CHICAGO AND NORTHWESTERN RAILWAY COMPANY. } No. 3122. Law.

THURSDAY, *Oct.* 23, 1884.

This cause came on this day for hearing. Plaintiff appears by Bryan and Bryan and defendant by Charles A. Clark, and the defendant's motion for a continuance herein was submitted to the court.

119 And on the 25th day of October, 1884, the defendant filed in said cause an affidavit of Whiting S. Clark in reply to affidavit resisting motion for continuance in the words and figures following, to wit:

120 *Motion for Continuance. Affidavit in Reply.*

In the Circuit Court of the United States, Southern District of Iowa, Central Division.

GUS. B. OHLE *vs.* THE CHICAGO & NORTHWESTERN RAILWAY COMPANY.

I, WHITING S. CLARK, being duly sworn, say as follows:

That the plea in abatement herein raises new issues as to the jurisdiction of this court which I have not investigated and am not prepared to try; particularly important being the issue of fact raised by the first division of said plea as to the actual residence of the plaintiff, and I do not know the grounds and evidence upon which Judge Hubbard was relying in regard to this issue, as I have not consulted with him upon the issues raised by the plea. Directly after the plea was filed I had a copy thereof sent to Judge
121 Hubbard, as I knew that he expected to prepare for the trial of the issues, and it was not my duty to do so unless directed to do so by him; and I knew from incidental talk prior to the filing of said plea that he expected personally to prepare for the trial of the issues therein, and that he regards the question of jurisdiction herein of great importance as a precedent as well as in this case, and is especially desirous of trying that question himself personally.

(S'g'd) WHITING S. CLARK.

Subscribed and sworn to before me, this 25th day of October, 1884.

[Notarial seal.] (S'g'd) JOHN D. JORDAN,
Notary Public, Polk Co., Iowa.

(Endorsed:) Gus. B. Ohle *vs.* Chicago & N. W. R'y Co. Affidavit of Whiting S. Clark. Filed Oct. 25, 1884. Ed. R. Mason, clerk.

122 And on the 25th day of October, 1884, in the record of the proceedings in said court is an entry in said cause in the words and figures following, to wit:

123 United States Circuit Court, Southern District of Iowa, Central Division. October Term, 1884.

GUS. B. OHLE
vs.
CHICAGO AND NORTHWESTERN RAILWAY COMPANY. } No. 3122. Law.

SATURDAY, *October* 25, 1884.

This cause came on this day for hearing, having been heretofore submitted to the court upon defendant's motion for a continuance herein, and the court being now fully advised in the premises, it is ordered that said motion be and the same is hereby overruled.

124 And on the 28th day of October, 1884, the defendant, by its attorneys, N. M. Hubbard, Chas. A. Clark, and Whiting S. Clark, filed in said cause its answer and demurrer to plaintiff's plea, in the words and figures following, to wit:

125 In United States Circuit Court in and for the Southern District of Iowa.

GUS. B. OHLE
vs.
THE CHICAGO & NORTHWESTERN RAILWAY COMPANY.

Answer and demurrer to plaintiff's plea to the jurisdiction of the court.

Now comes the defendant and says to the plaintiff's said plea:

I.

To the first count of said plea defendant denies each and every allegation therein contained, except that defendant is a citizen of Illinois, as alleged; and defendant says that plaintiff's alleged citizenship in the State of Illinois was collusive and colorable only for the sole purpose of avoiding the jurisdiction of the United States courts in this cause, and not an actual residence in good faith in said state.

126 II.

To second count of said plea defendant demurs, and for ground of demurrer shows the court that in the said proceedings for cost bond the question of citizenship of the plaintiff in Illinois was not in issue nor adjudicated upon by the court, as shown by the record herein made a part of said second count.

2. The proceedings as to cost bond relate to plaintiff's non-residence in this State at the time thereof, and not to his citizenship at the time this suit was begun.

III.

To the third count of plaintiff's said plea defendant demurs, and for ground of demurer says:

1. The facts stated constitute no estoppel herein as to plaintiff's citizenship, as the plaintiff was not mislead.

2. The plaintiff never gave said bond, as shown by the record made a part of said third count.

127 3. The proceedings in relation to said cost bond were based upon the plaintiff's allegations and admission as to his residence in Illinois, which the record shows, the defendant subsequently learned, were untrue.

4. Said proceedings did not involve the question of plaintiff's citizenship in Illinois at all, but merely his non-residence in Iowa.

IV.

To the fourth count of plaintiff's said plea defendant demurs, and for ground of demurrer says:

1. That said petition- for removal were each in sufficient and proper form, and that the action of said State court in refusing said

removal was void, and the filing of said petitions operated to remove said cause to this court.

(Signed) N. M. HUBBARD,
CHAS. A. CLARK, &
WHITING S. CLARK,
Def'ts Atty's.

128 (Endorsed:) U. S. circuit court, southern dist., Ia. Gus. B. Ohle *vs.* C. & N. W. R'y Co. Def'ts ans. & demurrer to pl'ff's plea to jurisdiction. Filed Oct. 28, 1884. E. R. Mason, clerk, N. M. Hubbard, Chas. A. Clark, & Whiting S. Clark, def'ts att'ys.

129 And on the 30th day of October, 1884, the defendant, by its attorneys, filed in said cause the following request for instructions to the jury in the words and figures following, to wit:

130 *Instructions Asked by Defendant.*

In the Circuit Court of the United States, Southern District of Iowa, Central Division.

GUS. B. OHLE
vs.
THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

1. The domicile of the plaintiff remained that of his parents in Iowa during his stay in Janesville for the temporary purpose of acquiring an education in telegraphy, and he remained a citizen of Iowa during the time he staid in Janesville for such temporary purpose.

Refused.
(S'g'd) O. P. SHIRAS.

2. In order to acquire a domicile and citizenship in Illinois the defendant must have gone there in November, 1883, with the intention of remaining there permanently then. It was not
131 enough if his intention was to go on to Janesville and finish his education there and then return to Illinois to remain permanently. If such was his intention his citizenship in Illinois would only date from the time he in fact went there to stay permanently, which, according to his own testimony, was March 13th, 1884.

Refused.
(S'g'd) O. P. SHIRAS.

3. It is shown by the uncontroverted testimony of the plaintiff that he was a citizen of Iowa before he went to Janesville for the temporary purpose of acquiring an education in telegraphy; that in November, 1883, when it is claimed he changed his citizenship, he went to Chicago, in the State of Illinois, on his way to Janesville to complete his studies; that he remained in Chicago only temporarily at that time, and did not go to Illinois permanently until
132 March 13th, 1884. Under these circumstances the jury are instructed as a matter of law that plaintiff did not become a

citizen of Illinois until the date last named, namely, March 13th, 1884.

Refused.

(S'g'd) O. P. SHIRAS.

4. The jury are directed to find for defendant on the plea in abatement.

(Endorsed:) Ohle *vs.* Chic. & N. W. R'y Co. Instructions asked by def't. Filed Oct. 30th, 1884. Ed. R. Mason, clerk.

133 And on the 30th day of October, 1884, in the record of proceedings in said court is an entry in said cause in the words and figures following, to wit:

134 United States Circuit Court, Southern District of Iowa, Central Division. October Term, 1884.

GUS. B. OHLE
vs.
CHICAGO AND NORTHWESTERN RAILWAY COMPANY. } No. 3122, Law.

THURSDAY, *October* 30, 1884.

This cause came on this day for hearing on the plaintiff's plea to the jurisdiction herein.

Plaintiff appears by Bryan and Bryan, and defendant by Charles A. Clark and Whiting S. Clark. Then came a jury of twelve good and lawful men, to wit, George Orr, Alex. Stewart, E. G. Foster, S. A. Kelsey, J. T. Wright, Wm. Sumner, Herman Kinsman, John Graham, Miles Jordan, S. McCown, D. H. Scott, and E. C. Crispin, who were duly and legally empaneled and sworn according to law; and they, having heard the statement of the case, evidence, and charge of court, retire to a private room, under charge of a sworn officer, to consider of their verdict herein.

135 And on the 31st day of October, 1884, in the record of the proceedings in said court is an entry of judgment in said cause in the words and figures following, to wit:

136 United States Circuit Court, Southern District of Iowa, Central Division. October Term, 1884.

GUS. B. OHLE
vs.
CHICAGO AND NORTHWESTERN RAILWAY COMPANY. } No. 3122. Law.

FRIDAY, *October* 31*st*, 1884.

This cause came on this day for hearing. Plaintiff appears by Bryan and Bryan, and the defendant by Charles A. Clark and Whiting S. Clark; and the jury, after some time spent in deliberation, return into open court the following special verdict, to wit:

"Gus. B. Ohle *vs.* Chicago and Northwestern R. R. Co. When

the present action was commenced in the circuit court of Polk county, Iowa, of what State was plaintiff at that time a citizen?

Ans. Illinois.

(Signed) "WM. S. SUMNER, *Foreman*.

"When did the plaintiff, Ohle, become a citizen of the State of Illinois?

Ans. Nov. 6th, 1883.

(Signed) "WM. S. SUMNER, *Foreman*."

Thereupon it was ordered that said plea of abatement herein be, and the same is hereby, sustained, and that this cause be, and the same is hereby, remanded to the circuit court of the State of Iowa in and for Polk county, at the costs of defendant. It is

137 therefore ordered and adjudged that plaintiff do have and recover of and from the defendant, The Chicago and Northwestern Railway Company, the costs herein, taxed at $—, and that execution issue therefor.

138 And on the 31st day of October, 1884, the defendant, by its attorneys, filed in said cause a bill of exceptions in the words and figures following, to wit:

139 *Bill of Exceptions.*

In the Circuit Court of the United States, Southern District of Iowa, Central Division.

GUS. B. OHLE

vs.

THE CHICAGO & NORTHWESTERN RAILWAY COMPANY.

Be it remembered that on the 30th day of October, A. D. 1884, the above-entitled action came on for trial upon plaintiff's plea to the jurisdiction of the court, before said court and a jury of twelve good and lawful men, duly selected, empaneled, and sworn to try the issue on said plea to the jurisdiction of the court; whereupon the following evidence was introduced on behalf of the plaintiff:

140 *Testimony of Gus. B. Ohle, Plaintiff in Above Cause, Taken on the Hearing of the Plea in Abatement October 30th, 1884, at Des Moines.*

In the Circuit Court of the United States, Southern District of Iowa, Central Division.

GUS. B. OHLE

vs.

THE CHICAGO & NORTHWESTERN RAILWAY COMPANY.

Q. Mr. Ohle, state to the jury if you are the plaintiff in this suit, Gus. B. Ohle.

A. Yes, sir.

Q. What is your present age?

A. 22.

Q. When were you 22?
A. Last of April.
Q. What year, this?
A. Why, this year.
Q. How old were you at the time you got hurt on the Northwestern railroad?
A. Eighteen.
Q. Have you a father living, or had you at that time?
A. Yes, sir.
Q. Where did he live then?
A. In Burlington, Iowa.
Q. Where does he live now?
A. Same place.

141 Q. Well, after you got hurt, where did you go to?
A. Ames, Iowa, first.
Q. It was near Ames where you got hurt?
A. Yes, sir.
Q. Well, then, how long did you stay at Ames?
A. About eight days.
Q. Then where did you go to?
A. Des Moines.
Q. How long did you stay there?
A. About two months.
Q. Then where did you go to after that?
A. Chicago, Illinois.
Q. How long did you stay there?
A. About seven months.
Q. In the hospital?
A. Yes, sir.
Q. For the purpose of being treated for your injury, I suppose?
A. Yes, sir.
Q. After you had stayed at Chicago about seven months, then where did you go?
A. Went home to my father's home.
Q. At Burlington?
A. Yes, sir.
Q. How long did you remain there?
A. About the 23rd of May, 1883.
Q. Then where did you go to from there?
A. Janesville, Wisconsin.

142 Q. Ain't you mistaken about that? Wasn't it in 1882 you went to Janesville? Oh, no! Hold on. Your case was tried here in 1883—the spring of the same year that the case was tried—in the following October.
A. Yes.
Q. What were you doing at Janesville?
A. Going to telegraph school.
Q. How long did you remain there at the telegraph school before you first left?
A. Until about the middle of October, 1883.
Q. Where did you go?

A. To Des Moines, Iowa.

Q. What was the purpose of your coming here to Des Moines at that time?

A. The time I had my trial?

Q. Well, how long did you remain in this city at that time—about how long?

A. About one week.

Q. Then where did you go from there first?

A. I went to Burlington then.

Q. To your father's?

A. Yes, sir.

Q. How long did you remain there at that time?

A. About one week.

143 Q. Then where did you go?

A. Chicago, Illinois.

Q. How long did you stay in Chicago?

A. About three weeks.

Q. And then where did you go?

A. Janesville, Wisconsin.

Q. For what purpose?

A. For finishing my education in telegraphy.

Q. How long did you remain there before you got through with your education in telegraphy that last time?

A. 13th of March, 1884.

Q. Do you recollect what time in the month—what month—it was you left Chicago to go back to Janesville to finish your education?

A. What month it was?

Q. Yes, sir.

A. November.

Q. What day of November do you recollect—day of the month, or about the day of the month?

A. About the 6th.

Q. That was when you went to Chicago. You say you went to Chicago about the 6th, and you stayed there about three weeks, you say?

144 C. A. CLARK: About the 6th of November, did you say, Col.?

Mr. BRYAN: Yes, about the 6th.

WITNESS: Please ask that question over.

Q. What time in the month did you go to Chicago at the time you left your father's at Burlington and went to Chicago?

A. About the time of the month I went to Chicago?

Q. The first time you went to Chicago after you had your trial?

A. That was about the 6th of November.

Q. You said you stayed there about three weeks?

A. Yes, sir.

Q. I asked you, then, did you recollect the precise time of the month that you left Chicago to go back to Janesville to finish your education?

A. It was November.
Q. I say about what day of November?
A. About the 27th.
Q. Well, now then, I asked you this question: How long did you stay in Janesville at that time until you got through?
A. To about the 13th of March, 1884.
Q. You did state that, I remember. Where did you go from there?
A. To Chicago, Illinois.
145 Q. Now I will ask you to state to the jury where you have been living since that time.
A. The same place—Chicago, Illinois.
Q. What are you engaged in, Mr. Ohle?
A. Working for the Western Union Telegraph Co.
Q. How long have you been working for that company?
A. Why, ever since the 13th of March.
Q. Ever since you came back from the school?
A. Yes, sir; 1884.
Q. Who got you that position there?
A. Valentine Brothers, the managers of the school.
Q. Had there ever been anything said to you before you got through with your education where you was going to live?
A. Yes, sir; I was going to Chicago.
Q. What, if anything, had they promised to do for you there?
A. Give me a situation there.
Q. When was that arrangement first understood between you?
A. When I first went to the school.
Q. And at the time you went to Chicago from your father's,
146 after you had had your trial here, state to the jury whether you moved there with the intention of making that your home.

Objected to as leading and suggestive.
Question withdrawn.

Q. State to the jury what purpose you had with reference to your home when you went to Chicago that time.
A. To work in a telegraphy there.
Q. Where did you expect to make your permanent residence?
A. Chicago, Illinois.
Q. Now I will ask you to state to the jury, after you first went to Janesville the first time, *state* whether you have ever lived, actually resided in Iowa, since that time.
A. No, sir; I have not.
Q. Since you went to Chicago on the 6th of November, 1883—you say about the 6th of November, 1883—how many times have you been back to Iowa since that, if any?
A. Once; counting this time it would be two.
Q. When was the other time?
A. October, a year ago.
Q. When you first went?
A. Yes, sir.

147 Q. Since you first went, I understand you, you have only been back twice—two times—to Iowa?

A. Yes, sir.

C. A. CLARK: He manifestly don't mean October a year ago, because he went to Chicago, he says, the 6th of November a year ago.

Mr. BRYAN: No; he came back to Iowa a year ago this October; that is one time. Now he came back this time; that is two times. Those two times you say are the only times you have *have* ever gone back to Iowa since you went to Janesville first?

A. Yes, sir.

Q. The other time you say you stayed about a week?

A. Yes, sir.

Q. Here at court?

A. Yes, sir.

Q. Then you went to visit your father; how long did you stay there?

A. About four or five days.

Q. Now, at the time you went to Chicago the first time, state to the jury what was your intention and purpose with reference to acquiring your citizenship in Illinois.

A. What was my intention going there?

Q. Yes, sir.

148 A. It was my intention to make my living at telegraphy.

Q. And make that your home?

A. Yes, sir.

C. A. CLARK: I wish you would let the witness testify.

Q. Now, I will ask you to state to the jury whether you have any present intention or purpose, or have had since you first went to Illinois, of moving to any other State?

Objected to as leading.

Objection sustained.

Mr. BRYAN: Give me a form for that.

C. A. CLARK: Yes, sir. Please state to the jury what your intentions have been since you went to Illinois, in November 6th, 1883, as to your future residence.

Mr. BRYAN: I adopt that question.

WITNESS: My intentions have been to stay right there.

Q. Well, how long have you had such intentions, Mr. Ohle?

A. Ever since I went there.

Q. Now, I will ask you to state if you went there at the time you went, if you went—I am getting that leading, I guess, Colonel, again.

149 C. A. CLARK: I will help you out.

Mr. BRYAN: You have stated, I believe, that you had an arrangement with Valentine Brothers that as soon as you got through with your education in telegraphy you was to be located in Illinois—in Chicago?

A. Yes, sir.

Q. Well, now, state to the jury what your purpose was in moving to Chicago sooner than that—sooner than the time you got through with your education.

A. For the purpose of getting this case in the United States court.

Q. Keeping it out, you mean?

A. Keeping it out, yes; I am getting it wrong.

Cross-examination:

Q. Well, Mr. Ohle, you said on your direct examination that after you came out of the hospital at Chicago you went home and stayed there until May 23rd, 1883?

A. Yes, sir.

Q. Didn't you mean August 23d, 1883?

A. No, sir; I did not.

Q. In May, was it?

A. Yes, sir.

150 Q. During the time that you attended school in Janesville how have your expenses been paid?

A. The president of the C., B. & Q. R'y paid them.

Q. Your father and mother didn't pay them?

A. They helped me some, but not very much, on account of not being able.

Q. When did they last assist you to pay your expenses?

A. They have assisted me right along, and are doing it yet, whenever they can.

Mr. BRYAN: Do you mean the railroad or your parents?

C. A. CLARK: Father and mother, when did they last assist you?

A. They are doing it yet—trying to.

Q. Now, after the trial here, a year ago this month, I understand you you went from here to visit your parents in Burlington?

A. When was that? Ask that over again.

Q. Well, you was here when this case was tried, a year ago?

A. Yes, sir.

Q. This month?

A. Yes, sir.

151 Q. And you went from here, as I understand you, to visit your parents in Burlington?

A. I did.

Q. You stayed there four or five days, or a week?

A. Yes, sir.

Q. Then you went to Chicago?

A. Yes, sir.

Q. Now, what do you say you went to Chicago for?

A. What I went to Chicago for?

Q. Yes.

A. Well, I went there a purpose to go back to Janesville.

Q. Going back to Janesville?

A. Yes, sir.

Q. What were you going back to Janesville for?

A. To finish out my education in telegraphy.

Q. When you went to Chicago, then, in November, after you left your parents, your plan was to go back to Janesville?

A. Yes, sir.

Q. And stay there until you finished your education?

A. Yes, sir.

Q. And after you finished your education you hoped then,
152 under an arrangement with your instructors, to go back to Chicago, did you?

A. No, sir.

Q. How was that?

A. Well, I had that arrangement made when I went there.

Q. Yes.

A. When I first went there.

Q. But you didn't expect to go back to Chicago until you had finished your education?

A. No, sir.

Q. And that was your expectation when you went back there a year ago—back to Janesville?

A. Yes, sir.

Q. You first went to Chicago, then, to stay permanently after you got through with your studies at Janesville?

A. Well, I went there then, yes, sir.

Q. How?

A. Yes, sir.

Q. Well, that was the first time you went there to stay permanently, wasn't it?

A. Yes, sir.

153 Q. Yes, that is the first time, and that was March 13th, 1884?

A. Yes, sir.

Testimony on being recalled:

By Mr. BRYAN, for pl'ff:

Q. At the time you first went to Chicago from your father's, in November, 1883, where did you live while you were in Chicago those three weeks?

A. I was rooming on Madison street.

Q. What number?

A. I forget the number now.

Q. After you came back from Janesville, where did you live?

A. I was rooming 199 W. Madison street.

Q. All the time?

A. No, sir.

Q. Then where did you room after that, when you changed?

A. I don't remember what numbers; I roomed right close there.

Q. On Madison street?

A. Yes.

Q. Where is your present—where do you room now?

A. 199 West Madison.

Cross-examination:

Q. I don't understand that you kept a room on Madison street while you were at Janesville completing your studies.

154 A. I did not keep a room all the time.

Q. You gave it up when you went back to Janesville, didn't you?

A. Yes.

Q. When you went back in March 13th, 1884, you took another room?

A. I came back to the same room that I was rooming in when I was there before.

Q. Hired that room again?

A. Yes, sir.

Q. You have changed once or twice since?

A. Yes, sir.

Witness dismissed.

PLAINTIFF'S COUNSEL: I will offer in evidence the affidavit of H. G. Burt on behalf of defendant, filed in this case the 2d day of January, 1884, in the circuit court of Polk county, Iowa.

Objected to by defendant, as immaterial, incompetent, and as not showing or tending to show the citizenship of the plaintiff at any time when such citizenship is in issue under the plea being tried.

155 Objection overruled, to which ruling the defendant excepts.

The affidavit admitted in evidence. The same appears in Exhibit A, hereto annexed and made part of this bill of exceptions.

PLAINTIFF'S COUNSEL: I will offer in evidence all the records in the case here in court, that is all the pleadings and everything as it is here in court. I want it considered in evidence.

DEFENDANT'S COUNSEL: That will make it necessary for us to specify some objections. We object to the admission of the affidavit of H. G. Burt, sworn to on the 22nd day of December, 1883, before S. R. Dyer, a notary public in and for Boone county, because the same is immaterial and incompetent, and does not show, or tend to show, the citizenship of the plaintiff at any time when such citizen-

156 ship in controversy under the plea now being tried. We object to the affidavit of N. M. Hubbard, sworn to on the 24th day of December, 1883, before F. F. Dawley, a notary public, as immaterial and incompetent, and foreign to the issues joined. We object to the motion for security of costs for the same reason. We object to the affidavit of P. Gad Bryan, sworn to on the 26th day of January, 1884, as immaterial, incompetent, and foreign to the issues. We object to the affidavit filed at the trial at the present term of court, for the same reasons. The application for continuance, and the affidavits filed in support of it, are object- to for the same reason. We object to the affidavit of Col. Bryan in resistance of the application and motion for continuance for the same reason.

A. To finish out my education in telegraphy.

Q. When you went to Chicago, then, in November, after you left your parents, your plan was to go back to Janesville?

A. Yes, sir.

Q. And stay there until you finished your education?

A. Yes, sir.

Q. And after you finished your education you hoped then,
152 under an arrangement with your instructors, to go back to Chicago, did you?

A. No, sir.

Q. How was that?

A. Well, I had that arrangement made when I went there.

Q. Yes.

A. When I first went there.

Q. But you didn't expect to go back to Chicago until you had finished your education?

A. No, sir.

Q. And that was your expectation when you went back there a year ago—back to Janesville?

A. Yes, sir.

Q. You first went to Chicago, then, to stay permanently after you got through with your studies at Janesville?

A. Well, I went there then, yes, sir.

Q. How?

A. Yes, sir.

Q. Well, that was the first time you went there to stay permanently, wasn't it?

A. Yes, sir.

153 Q. Yes, that is the first time, and that was March 13th, 1884?

A. Yes, sir.

Testimony on being recalled:

By Mr. BRYAN, for pl'ff:

Q. At the time you first went to Chicago from your father's, in November, 1883, where did you live while you were in Chicago those three weeks?

A. I was rooming on Madison street.

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Q. After you came back from Janesville, where did you live?

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Q. All the time?

A. No, sir.

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Q. On Madison street?

A. Yes.

Q. Where is your present—where do you room now?

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Cross-examination:

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154 A. I did not keep a room all the time.

Q. You gave it up when you went back to Janesville, didn't you?

A. Yes.

Q. When you went back in March 13th, 1884, you took another room?

A. I came back to the same room that I was rooming in when I was there before.

Q. Hired that room again?

A. Yes, sir.

Q. You have changed once or twice since?

A. Yes, sir.

Witness dismissed.

PLAINTIFF'S COUNSEL: I will offer in evidence the affidavit of H. G. Burt on behalf of defendant, filed in this case the 2d day of January, 1884, in the circuit court of Polk county, Iowa.

Objected to by defendant, as immaterial, incompetent, and as not showing or tending to show the citizenship of the plaintiff at any time when such citizenship is in issue under the plea being tried.

155 Objection overruled, to which ruling the defendant excepts.

The affidavit admitted in evidence. The same appears in Exhibit A, hereto annexed and made part of this bill of exceptions.

PLAINTIFF'S COUNSEL: I will offer in evidence all the records in the case here in court, that is all the pleadings and everything as it is here in court. I want it considered in evidence.

DEFENDANT'S COUNSEL: That will make it necessary for us to specify some objections. We object to the admission of the affidavit of H. G. Burt, sworn to on the 22nd day of December, 1883, before S. R. Dyer, a notary public in and for Boone county, because the same is immaterial and incompetent, and does not show, or tend to show, the citizenship of the plaintiff at any time when such citizen-

156 ship in controversy under the plea now being tried. We object to the affidavit of N. M. Hubbard, sworn to on the 24th day of December, 1883, before F. F. Dawley, a notary public, as immaterial and incompetent, and foreign to the issues joined. We object to the motion for security of costs for the same reason. We object to the affidavit of P. Gad Bryan, sworn to on the 26th day of January, 1884, as immaterial, incompetent, and foreign to the issues. We object to the affidavit filed at the trial at the present term of court, for the same reasons. The application for continuance, and the affidavits filed in support of it, are object- to for the same reason. We object to the affidavit of Col. Bryan in resistance of the application and motion for continuance for the same reason.

By the COURT: The objections are well taken to all that is
157 offered except the affidavit made by Burt, and the motion for security for costs; as to those two the objections are overruled, and as to the others the objections are sustained. The other matters are wholly immaterial.

To which ruling of the court the defendant at the time duly excepted.

The affidavit of Burt and the motion for costs received in evidence and read to the jury. The same are hereto annexed, marked Exhibit A, and made a part of this bill of exceptions.

The foregoing is all the evidence offered on the trial of the plea in abatement.

EXHIBIT A.

In the Polk County Circuit Court, State of Iowa.

GUS. B. OHLE *vs.* THE CHICAGO & NORTHWESTERN RAILWAY CO.

158 STATE OF IOWA, } *ss:*
Boone County, }

I, H. G. Burt, being first duly sworn, on oath say: That I am the superintendent of the Iowa Division of the Chicago & Northwestern Railway Company, which includes the main line from Clinton, Iowa, to Council Bluffs, Iowa, together with several branches; that I am acquainted with the facts in regard to the injury of Gus. B. Ohle, for which the above suit is brought, and that the defendant has a good defense to the entire claim made by the plaintiff in said cause, and that the plaintiff is a non-resident of the State of Iowa, as he claims in his petition in this case, and as I believe.

(S'g'd) H. G. BURT,
Sup't Iowa Div.

Subscribed and sworn to before me, and in my presence, by H. G. Burt this 22nd day of Dec., 1883.

[Notarial seal.] (S'g'd) S. R. DYER,
Notary Public in and for Boone County, Iowa.

159 Upon the foregoing affidavits of H. G. Burt and N. M. Hubbard the defendant now moves the court to require the plaintiff to give a bond in the sum of fifteen hundred dollars, with a sufficient surety, to be approved by the clerk, for the payment of all costs which may accrue in the action in the court in which it is brought, or in any other to which it may be carried, either to the defendant or to the officers of the court.

(S'g'd) WHITING S. CLARK,
N. M. HUBBARD,
Att'ys for Def't.

And be it further remembered that after the testimony upon the trial of said issue was closed the defendant in writing requested the court to charge the jury as follows:

1. The domicile of the plaintiff remained that of his parents in Iowa during his stay in Janesville for the temporary purpose
160 of acquiring an education in telegraphy, and he remained a citizen of Iowa during the time he staid in Janesville for such temporary purpose.

Which instruction the court refused to give. To which action of the court the defendant at the time duly excepted.

And be it further remembered that at the same time the defendant further in writing requested the court to instruct the jury as follows:

2. In order to acquire a domicile and citizenship in Illinois the defendant must have gone there in November, 1883, with the intention of remaining there permanently then; it was not enough if his intention was to go on to Janesville and finish his education there and then return to Illinois to remain permanently. If such was not his intention his citizenship in Illinois would only date from the time he in fact went there to stay permanently,
161 which, according to his own testimony, was March 13th, 1884.

Which instruction the court ref-ed to give to the jury. To which action and decision of the court the defendant then and there duly excepted.

And be it further remembered at the same time the defendant in writing requested the court to instruct the jury as follows:

3. It is shown by the uncontroverted testimony of the plaintiff that he was a citizen of Iowa before he went to Janesville for the temporary purpose of acquiring an education in telegraphy; that in November, 1883, when it is claimed he changed his citizenship, he went to Chicago, in the State of Illinois, on his way to Janesville to complete his studies; that he remained in Chicago only temporarily at that time, and did not go to Illinois permanently until March 13th, 1884.

162 Under these circumstances the jury are instructed as a matter of law that plaintiff did not become a citizen of Illinois until the date last named, namely, March 13th, 1884.

Which instruction the court refused to give. To which action and decision of the court the defendant then and there duly excepted.

And be it further remembered that the defendant at the same time in writing requested the court to instruct the jury as follows:

4. The jury are directed to find for the defendant on the plea in abatement.

Which instruction the court refused to give, and the defendant then and there duly excepted. And thereupon the court, upon its own motion instructed the jury as follows:

Instructions of the Court, Given Orally.

GENTLEMEN OF THE JURY: 1. You are already aware that
163 the question that you are to determine in this case is not one that is decisive of the final controversy that there is between the parties. It is a question that arises on what we call a plea in abate-

ment. The question that is to be decided touches the jurisdiction of this court. You will understand, gentlemen, that under the laws regulating the courts of the United States *that* this court has jurisdiction ordinarily only of suits or controversies that are pending between citizens of different States, and which involve matters over the sum of five hundred dollars. There are some special matters over which the court may have jurisdiction without reference to citizenship, but that is not material to be explained. The ordinary rule, as I have said, is that this court cannot have jurisdiction to hear and determine the case unless the controversy is between citizens of different States.

164 2. You have also gathered from the arguments of counsel and the evidence that this case was not originally brought in this court, but was brought in the circuit court of Polk county, Iowa, which is what we call a State court. That court undoubtedly had jurisdiction of the case, the right to hear and to determine the case, unless the action has been removed properly under the statutes of the United States for trial to this court.

Now, whether or no that case could be removed into this court so that the State court was deprived of its jurisdiction turns upon the question of whether or no at the time the suit was commenced in the circuit court of Polk county the plaintiff, Ohle, was a citizen of a State other than the State of Illinois; and as the claim is made here on the part of defendant that he is a citizen of Iowa, I will use that term in defining the position the parties stood in.

165 3. Now, the Chicago & Northwestern Railway Co., it is not in question at all, is, within the meaning of these laws, a citizen of the State of Illinois. It is organized and created under the laws of the State of Illinois, and for jurisdictional purposes it is regarded in the law as being a citizen of that State. We start out then with the admitted fact that the Chicago & Northwestern Railway Co., defendant, is a citizen of the State of Illinois. Now, if when the suit was commenced in said court, the circuit court of Polk county, Gus. B. Ohle, the plaintiff, was also a citizen of the State of Illinois, then this court does not have jurisdiction, and the suit could not properly and lawfully be removed into this court. The diverse citizenship, that is citizenship of different States, must also have existed when the petition for removal was filed in the State court.

166 4. Now, the point that you are to determine and inquire into is whether or no, when the company filed its petition in the circuit court of Polk county, setting forth the facts and asking substantially as the prayer of that petition that this case should be removed—you are to determine whether or not Gus. B. Ohle was at that time a citizen of the State of Illinois or a citizen of the State of Iowa. If he was a citizen of Iowa, then the case could be removed, because then you will see that the controversy would be pending between citizens of different States. If, however, he was a citizen of the State of Illinois, then the case could not be removed, because then it would be a litigation or controversy between citizens of the same State, and of that class of litigation this court does not have jurisdiction. As

I have said, therefore, the question that is before you to be
167 determined by this inquiry or trial that we have gone into is to determine which court shall try and determine the case. Shall it be tried and determined in the State court or in this court? And it is determined by a plea in abatement, which raises the question of jurisdiction of this court. You will understand, therefore, gentlemen, that the point which you are called upon to decide is in regard to the citizenship of the plaintiff. The citizenship of the defendant is not in question. It is admitted that it was a citizen of the State of Illinois.

5. Now, you are simply to determine the question in regard to the citizenship of the plaintiff at the time this action was brought in the circuit court of Polk county and at the time the removal was sought by the filing of the petition in that court.

6. It appears from the uncontradicted evidence and the ad-
168 mission of counsel here who represent both sides that when the injury occurred that forms the subject-matter of this suit Mr. Ohle, the present plaintiff, was a minor. He had been residing and was residing with his parents at Burlington, in this State; or, in other words, at least his domicile or citizenship was with his parents; that is conceded. Now, the general rule or proposition, gentlemen, is that when a person once has a domicile or citizenship that continues until he acquires another. For all such purposes as the purpose of the inquiry that is before you you may hold that to be the rule and the law of the case—that a party who has citizenship and domicile in one place will retain it there until he acquires one in some other State or some other place.

7. In this case it is admitted to start out with that during his minority the citizenship and domicile of the plaintiff was with
169 his parents in the city of Burlington, being within the State of Iowa. The question is whether he has changed that citizenship. Now, this question of citizenship, gentlemen, is not determined solely by the mere matter of residence. Residence is evidence of citizenship—it is a fact to be taken into account—it is a fact of very decided and great weight, still a party, as we use the term, may reside in one place and yet his actual citizenship may be in another. His residence does not necessarily determine his citizenship. The question of citizenship is determined, according to the authorities, by the intent, coupled with the acts, of the party. Now, we are all citizens, we will say, to day of the State of Iowa; we are all residing here; we are all citizens here, we are voters here, and all the rights that a citizen has we exercise here, we will say, within the State of Iowa. Now, all of us or any one of us
170 may come to the conclusion that we will remove our citizenship—change our residence. Now, we remove or change our residence to Illinois, we will say. Now, whether or no that changes the citizenship depends on the circumstances. It depends on the intent of the party. You or I may go over, for instance, to the city of Chicago, take up our residence there, hire a house or buy a house and go to living there, and still have our citizenship in Iowa, if we go with a temporary purpose. We propose to return to Iowa, or

not having the purpose of leaving Iowa when we go from here, our citizenship still remains in Iowa; but if we leave Iowa with the intent to change the citizenship, and actually do take up our residence in another State, as for instance in the State of Illinois, then the intent, coupled with the action of changing the residence changes the citizenship, and it is not necessary that any particular length of time should pass that a party should reside or take up his abode, for instance, in the State of Illinois, if the change is made to that place for any particular length of time. Under the law of Illinois he may be required to remain there a particular length of time before he can hold office or exercise the right of voting; but all those provisions are for the purpose of controlling the particular thing to which they refer. He may be a citizen of the State and still not entitled to vote there; therefore, after all, when a person changes his residence from one State to another, the question is what is the intent?

171

8. If a person leaves one State and goes to the other with the intention of becoming a citizen of the other, and does actually leave the State where he has been actually domiciled and go to the other State with the intention of becoming a citizen, then when he actually reaches the place that he proposed to change to, so that it is clear that he has fully performed the act, that is sufficient to justify you in finding that there is a change in citizenship. The law does not specify any specific length of time—a year or six months, or a month even.

172

It is a question of good faith, of honest, *bona fide* intent. If a person intends to change, and does actually go into the State of Illinois with that intent, with the intention of becoming a citizen of that State, when those two things combine that is sufficient to justify you in finding that he does become a citizen of that State.

In the application of this principle you have got to look at all the facts; you have got to find the intent, and you have got to find this overt act as it is defined in some of the cases, and the intention the person has in his mind is to be determined by all the facts and circumstances that surround it.

173

9. Some reference has been made to the fact that the plaintiff intended to defeat the jurisdiction of this court. Now, that may be the motive that influenced the plaintiff in changing, but if he does honestly intend to change his citizenship, and does go over into the other State for the purpose of becoming a citizen of that State, even though his motive be to defeat the jurisdiction of a court that does not prevent his becoming a citizen of Illinois. A person has a perfect right to change his citizenship, if he does it with good faith, even though his motive may be to defeat the jurisdiction of a court, or to gain jurisdiction of some court. A man may prefer to make such a change as to bring about that result, and yet there is nothing in the law that condemns that purpose. It is just exactly as though a person changes his residence in order to subject himself to the laws of a different State. A man may prefer the set of laws that prevails in Illinois to those that prevail in Iowa.

174

If that is his motive he has a perfect right to go there, if he goes there in good faith.

He might have gone to escape from the action of the laws of Iowa as being different from laws of Illinois, and he has a perfect right to do so. Although his motive may have been to avoid the jurisdiction of this court that does not settle the question either way. If it is done with the intent simply of coloring his citizenship. If, while he remains a citizen of Iowa, he simply goes into the State of Illinois merely to obtain a colorable citizenship whilst he does actually remain a citizen of Iowa, then that is considered to be
175 colorable only, and the law condemns it. In other words, it won't recognize that such a change will defeat the jurisdiction of the court here. If a person goes into Illinois for a few days or a few months even, and it is done merely to avoid a suit, and then when he has accomplished that object he is going to return here to Iowa, he has not then become in good faith a citizen of the State of Illinois, for he has not had the honest intent to give up the citizenship in Iowa and assume citizenship in Illinois; so that in all these cases you have a right to consider this question of motive or intent which influenced the party, in weighing and determining what the party really intends to do, whether the change — made in good faith or whether it is merely colorable for the purpose of avoiding the jurisdiction of either court here in the State of Iowa while he still really remains a citizen of this State.

176 10. Now, then, gentlemen, coming down to the facts of this particular case, there is testimony here tending to show that Ohle, during his minority, was a citizen of this State, because that citizenship was conferred upon him by the citizenship of his parents. Then after he had received this injury, and after he had become of age, he had gone to different points. He went to the city of Chicago, and he was also at Janesville, Wisconsin. At Janesville he was engaged in receiving an education or training to fit him for the purpose of telegraph operator. Now then, gentlemen, it is admitted on both sides that so far as his residence at Janesville is concerned, that did not make him a citizen of the State of Wisconsin; for whilst he was there he was simply there to go to school for the simple purpose of getting that education.

177 11. Now you can see there is an illustration to enable you to see the point with regard to the temporary residence, as of students at college. They may be living in a city and going to college, and if they are simply there for that purpose they remain citizens of the States from whence they came. Their citizenship is generally the citizenship acquired before they go to this school, for in those cases the students go to these colleges with the intention of returning ordinarily to their original homes. They recognize the homes of their parents as their home during the time they are in college; therefore their *their* citizenship is not changed. The fact that this party went to Janesville to go through with his education, does not weigh particularly either way in this matter. He did not become thereby a citizen of the State of Wisconsin, because he had never any intent to become such citizen.

12. Now the point that you are to decide, gentlemen, is
178 this: Did the plaintiff, Gus. B. Ohle, at any time leave the State of Iowa for the purpose of taking up, actually and in good faith, his residence and citizenship in Illinois? Now I use the word residence, meaning this: It would not be sufficient merely to show that he went and resided in the sense of living in Illinois. Residence is evidence of the citizenship. You are ultimately to find whether he became a citizen of Illinois. In deciding that question you have a right to consider what he did in the matter of residence; that is, where he actually lived; the place he occupied, what we ordinarily mean by the term living. Now, it is claimed on the part of Ohle that he went to Chicago in November, 1883; that it was his intent to remove to the State of Illinois, and with the purpose of completing his education by going through this school at Janesville, and then pursuing his vocation in life in the State of Illinois.
179 Now, if he did in good faith leave the State of Iowa, give up the citizenship here, going to Chicago, Ills., with the idea of taking up his citizenship there, did actually do that in good faith, although he may at that time have had it in his mind, and he did actually go to Janesville to complete his education, that would not defeat his acquiring his citizenship in the State of Illinois at the time he actually went there in November, provided you find, remember, gentlemen, that he had the intent at that time, *bona fide*, actual intent, of settling in Illinois. Now, you are to determine this under the evidence that has been submitted to you; you are to determine whether, at that time, he then had the honest intent of changing his residence. If he did, and he went over there with that purpose, with that intent, and remained in Chicago for
180 for whatever time the evidence shows, some two or three weeks, it is for you to determine the question as to that. If that was his object and intent it would justify you in finding that he had acquired a citizenship there. The fact that he then went to Janesville to complete his education would no more defeat his citizenship in Illinois than it would defeat his citizenship in Iowa if he had still retained that citizenship.

It then remains for you to determine the object and intent that he then had.

13. Now, it is contended on the part of the defendant that he did not acquire citizenship in Chicago until he went there in March, 1884, after he had completed his schooling in Janesville. Now, if he did not, if that was the first time that he had actually went to Chicago with the intent to remain there and take up his citizenship and his residence there, why then you would have to find that that
181 was the time that he lost his citizenship in Iowa and acquired it in Illinois. Therefore, as I say, the question is what was his intent. By way of illustration, if when he went to the city of Chicago in November, 1883, his object and purpose was simply to go through Chicago to Janesville to complete his education, with the intention some time in the future, after he had completed his education, of going back to Illinois, then he would not acquire his citizenship until he actually went there; but if, when he went in 1883,

he went with the intention of actually changing his residence and acquiring a citizenship in Chicago, Illinois, then if you find that to be the fact you are justified in finding that at the time he changed his citizenship within the meaning of the questions involved in this case.

14. Gentlemen, there are two special findings that will be
182 submitted to you, as follows:

The defendant asks the court to require the jury to answer the following question:

1. When did the plaintiff, Ohle, become a citizen of the State of Illinois?

The court has also prepared another question in the following form:

When the present action was commenced in the circuit court of Polk county, Iowa, of what State was plaintiff at that time a citizen?

It is agreed by counsel that this was on the 19th day of November, 1883. The question requires you to answer, therefore, at that time of which State was the plaintiff a citizen. If you find it was Iowa, you should say Iowa in answer. If you find Illinois, say Illinois.

The foregoing are all of the instructions given by the court to the jury upon the trial of said issue.

183 And be it further remembered that to the giving of the 8th paragraph of said instructions to the jury the defendant at the time duly excepted.

And be it further remembered that to the giving of the 9th paragraph of said instructions by the court to the jury the defendant at the time duly excepted.

And be it further remembered that to the giving of the 12th paragraph of said instructions by the court to the jury the defendant at the time duly excepted.

And be it further remembered that to the giving of the 13th paragraph of said instructions by the court to the jury the defendant at the time duly excepted.

And be it further remembered that on the 31st day of October, 1884, the jury returned into court their special findings in said cause, as follows:

184 1. When did the plaintiff, Ohle, become a citizen of the State of Illinois?

Answer. November 6th, 1883.

WM. SUMNER, *Foreman.*

2. When the present action was commenced in the circuit court of Polk county, Iowa, of what State was the plaintiff at that time a citizen?

Answer. The State of Illinois.

WILLIAM SUMNER, *Foreman.*

And be it further remembered that on the 31st day of October, 1884, this cause came on for further hearing upon the special find-

ings of the jury rendered as hereinbefore set forth, and thereupon it was adjudged by the court that the plaintiff's plea to the jurisdiction of the court be sustained, and that this cause be remanded to the circuit court of Polk county, Iowa, for further proceedings herein. To which judgment and decision of the court the defend-
185 ant at the time duly excepted.

And now, in open court, the defendant brings this its bill of exceptions, and prays that the same may be signed and made a part of the record; which is accordingly done this 31st day of October, A. D. 1884.

(Signed) O. P. SHIRAS, *Judge.*

(Endorsed:) Ohle *vs.* Chi. & N. W. R'y Co. Bill of exceptions. Filed Oct. 31, 1884. Ed. R. Mason, clerk.

186 And on the 1st day of November, 1884, the defendant, by its attorneys, filed in said cause a supersedeas bond in the words and figures following, to wit:

187 *Supersedeas Bond.*

In the United States Circuit Court in and for the Southern Dist. of Iowa.

GUS. B. OHLE *vs.* THE CHICAGO & NORTHWESTERN R'Y CO.

Know all men by these presents that The Chicago and Northwestern Railway Company, as principal, and Wm. D. Lucas, as surety, are held and firmly bound unto Gus. B. Ohle in the sum of five thousand dollars, to be paid to the said Ohle, his executors or administrators; to which payment, well and truly to be made, we bind ourselves & each of us, jointly and severally, and our and each of our heirs, executors, administrators, & successors, firmly by these presents.

Sealed with our seals.

Dated this 31st day of October, 1884.

Whereas the above-bounden Chicago and Northwestern R'y Co. hath procured a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the southern district of Iowa:

Now, therefore, the condition — this obligation is such that if the above-named Chicago and Northwestern R'y Co. shall prose-
188 cute its said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise of full force and effect.

(Signed) THE CHICAGO & NORTHWESTERN R'Y CO.,
By its Att'y, WHITING S. CLARK.
(Signed) WM. D. LUCAS, *Surety.*

STATE OF IOWA, } ss.
Polk County, }

We, the undersigned, first being duly sworn, depose and say, and each for himself deposes and says: That he is one of the sureties whose name is subscribed to the within and foregoing bond; that he is a resident of the State of Iowa; that he is worth double the sum secured by said bond beyond the amount of his debts and liabilities, to wit, the sum of ten thousand dollars, and that he has property liable to execution in said State equal to the sum secured in said bond, to wit, the sum of five thousand dollars.

(Signed) WM. D. LUCAS.

Subscribed in my presence and sworn to before me by W. D. Lucas this 31st day of October, A. D. 1884.

[SEAL.] (Signed) W. G. TOWN,
Notary Public.

189 This bond accepted and approved by me this 31st day of October, A. D. 1884.

(Signed) O. P. SHIRAS, *Judge.*

(Endorsed:) Gus. B. Ohle *vs.* Chi. & N. W. R'y Co. Writ of error. Bond. Filed Nov. 1, 1884. E. R. Mason, clerk.

190 And on the 1st day of November, 1884, a writ of error was issued out of the clerk's office in said cause, the original of which is herewith returned, in the words and figures following, to wit:

191 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the circuit court of the United States for the southern district of Iowa, central division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you between Gus. B. Ohle, plaintiff, against The Chicago and Northwestern Railway Company, defendant, a manifest error hath happened, to the great damage of the said Chicago and Northwestern Railway Company, defendant, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, now in session, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error; what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison B. Waite, Chief Justice of the Supreme Court of the United States, the 1st day of November, A. D. 1884.

[Seal U. S. circuit court, southern district, Iowa.]

E. R. MASON,
Clerk U. S. C. C., S. Dist. of Iowa.

Allowed.

O. P. SHIRAS, *Judge.*

[Endorsed:] Gus. B. Ohle *vs.* Chicago & Northwestern Railway Co. Writ of error. Filed Nov. 1, 1884. Ed. R. Mason, clerk.

192 And on the 18th day of November, 1884, a citation with acceptance of service endorsed thereon was filed in said cause, the original of which is herewith returned in the words and figures following, to wit:

193 THE UNITED STATES OF AMERICA:

To Gus. B. Ohle, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, now in session, to be holden at Washington on the 1st Monday of December next, to wit, Dec. 1st, 1884, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Iowa, central division, wherein The Chicago & Northwestern Railway Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable O. P. Shiras, judge of the district court of the United States for southern district of Iowa, this 1st day of November, in the year of our Lord one thousand eight hundred and eighty-four.

O. P. SHIRAS,
Dist. Judge.

193½ Service of the within citation is hereby acknowledged, with copy thereof in hand, this 18th day of Nov., 1884.

BRYAN & BRYAN,
Att'ys for Pl'ff.

[Endorsed:] Gus. B. Ohle *vs.* Chicago and Northwestern Railway Co. Citation. Filed Nov. 18, 1884. Ed. R. Mason, clerk.

194 United States Circuit Court, Southern District of Iowa, Central Division.

I, E. R. Mason, clerk of said court, do hereby certify that the above and foregoing transcript contains full, true, and complete copies of all the pleadings, proceedings, and record entries in a certain cause adjudicated in said court, wherein Gus. B. Ohle was plaintiff and

The Chicago and Northwestern Railway Company was defendant, as full, true, and complete as the originals of the same now remain on file and of record in my office.

I further certify that the original writ of error is hereto attached and herewith returned.

I further certify that the original citation, with acceptance of service endorsed thereon, is hereto attached and herewith returned.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court at my office, in the city of Des Moines, in said district, this 22d day of November, A. D. 1884.

[Seal U. S. circuit court, southern district, Iowa.]

E. R. MASON,
Clerk U. S. Circuit Court, Southern District, Iowa.

Endorsed on cover: S. Iowa U. S. C. C. No. 803. The Chicago & Northwestern Railway Company, plaintiff in error, *vs.* Gus. B. Ohle. Filed 29th November, 1884.

117-123

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

NO. 803.

The Chicago & Northwestern Railway Company,

Plaintiff in Error,

VS.

GUS B. OHLE.

AT LAW.

ERROR TO UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF IOWA.

BRIEF FOR PLAINTIFF IN ERROR,

By N. M. HUBBARD and CHAS. A. CLARK.

ABSTRACT OF FACTS.

This is an action brought in the state courts of Iowa by Ohle, the defendant in error here, plaintiff below, to recover $20,000 damages for injuries received in April, 1880, while in the employment of the Railway Co., plaintiff in error.

The Railway Co. sought to remove the action into the United States Circuit court for trial under the act of 1875, on the ground of the diverse citizenship of the parties, and having filed in the state court its petition and bond in due form to effect a removal filed a transcript of the record in the federal court.

There Ohle appeared and filed a plea to the jurisdiction, alleging that both the Railway Co. and himself were citizens of the state of Illinois and praying that the cause be remanded to the state court for that reason. This plea was tried to a jury, who rendered a verdict in favor of Ohle thereon, and the court below ordered the cause remanded. Thereupon the Railway Co. brings the case here on a writ of error, complaining of the rulings and instructions of the court on the trial of Ohle's plea to its jurisdiction.

The Railway Co. is admitted to be a citizen of Illinois. Ohle was a minor when injured. There is no dispute that his parents were citizens of Iowa, and that his home and citizenship were in Iowa until two weeks before the commencement of this action, when he claims to have become a citizen of Illinois for the avowed and admitted purpose of keeping this cause out of the federal court. (Record 45.)

Whether this change of citizenship was in fact made rests wholly upon the testimony of Ohle himself. There is no other evidence in the case, and no dispute or conflict as to the facts.

It thus appears that a former action which he brought against the Railway Co., for the same injuries was transferred to the federal court, and was there tried at the October term, 1883, when the jury disagreed and he dismissed his action. (Record 7.)

For six months prior to this trial he had been attending school at Janesville, Wis., studying telegraphy, having attained his majority just before he commenced going to school. (Record 41.) There is no claim that this was a change of his residence or citizenship from Iowa.

After the mistrial and dismissal of his first action above stated, he made his parents a visit at his home in Burlington, Iowa.

From there he went to Chicago, where he arrived Nov. 6th, 1883. He staid there about three weeks, and then went on to Janesville, Wis., to school, finishing his studies there March 13th, 1884. (Record 42.)

His claim is that he became a citizen of Illinois while on his way from his home in Iowa to school at Janesville, Wis., to complete his studies. The only semblance of evidence on which to base this claim is his testimony on page 44 of the record, which should be read in full to be appreciated. Even this semblance is dissipated by his clear statements on cross-examination, which are here given by question and answer.

Question—You went from here (Des Moines, after first trial,) to visit your parents in Burlington?

Answer—I did.

Q.—You stayed there four or five days or a week?

A.—Yes sir.

Q.—I believe you went to Chicago?

A.—Yes sir.

Q.—Now what do you say you went to Chicago for?

A.—What I went to Chicago for?

Q.—Yes.

A.—*Well, I went there a purpose to back to Janesville.*

Q.—Going back to Janesville?

A.—Yes sir.

Q.—What were you going to Janesville for?

A—*To finish my education in telegraphy.*

Q.—When you went to Chicago then in November, after you left your parents, *your plan was to go back to Janesville?*

A.—*Yes sir.*

Q.—*And stay there until you finished your education?* A.—*Yes sir.*

* * * * * * * * *

Q.—But you did not expect to go back to Chicago until you had finished your education?

A.—*No sir.*

Q.—And that was your expectation when you went back there a year ago—back to Janesville?

A.—*Yes sir.*

Q.—You first went to Chicago then to stay permanently after you got through with your studies at Janesville?

A.—Well, I went there then, yes sir.

Q.—How?

A.—*Yes sir.*

Q.—Well that was the first time you went there to stay permanently, wasn't it?

A.—Yes sir.

Q.—Yes, that is the first time, and that was March 13th, 1884?

A.— *Yes sir.*

(Record 45–6.)

This suit was commenced Nov. 20th, 1883. (Record 3–4.) The petitions for removal ~~were~~ filed ~~Feb. 20th and~~ March 7th, 1884. (Record 9–11.) And the suit was removable unless Ohle became a citizen of Illinois in November, 1883, when he went through Chicago, to use his own words, "a purpose to go back to Janesville."

On the foregoing state of facts, the Railway Co. in effect asked the court to instruct the jury to find against Ohle.

The court refused to give any of these instructions, and there was a separate and distinct exception by plaintiff in error as to each instruction so refused. (Record 49.)

And against the views urged in the instructions asked by plaintiff in error the court instructed the jury, *inter alia*, as shown by assignment of errors below.

On the instructions thus given, and refused, arises the principal contention of the plaintiff in error in this court.

One other matter is complained of. It is provided by the Code of Iowa of 1873, as follows:

"Section 2927. If a defendant shall at any time before answering make and file an affidavit stating that he has a good defense in whole or in part, the plaintiff, if he be a non-resident of this state, or a private or foreign corporation, before any other proceeding in the cause, shall file in the clerk's office a bond, with a sufficient security to be approved by the clerk, for the payment of all costs which may accrue in the action in the court in which it is brought, or to which it may be carried, either to the defendant, or to the officers of the court. The application for such security shall be by motion, filed with the case, and the facts supporting it must be shown by affidavits annexed thereto, which may be responded to by counter affidavits, on or before the hearing of the motion, and each party shall file all his affidavits at once, and none thereafter."

Section 2928. An action in which a bond for costs is required by the last section shall be dismissed if a bond be not not given in such time as the court may allow."

Under these statutory provisions, the Railway Co., before filing its petition for removal made an application to the state court to com-

pel Ohle to give security for costs, he having averred in his declaration (Record 1) that he was a resident and citizen of the state of Illinois. And in support of said application the Railway Co. submitted the affidavit of its division superintendent, "that the defendant has a good defense to the entire claim made by the plaintiff in said cause, and that the plaintiff is a non-resident of the state of Iowa, as he claims in his petition in this case and as I verily believe." (Record 48.)

On the trial of Ohle's plea, this affidavit was offered in evidence for him, presumably upon the theory that it contained an admission in his favor. It was objected to by the Railway Co. on the ground that it was "immaterial, incompetent, and as not showing or tending to show the citizenship of the plaintiff," which objection was overruled, the affidavit received in evidence, and the plaintiff in error excepted. (Record 47.)

As already stated, the jury rendered a verdict sustaining the plea; judgment was entered thereon remanding the cause to the state court, whereupon the Railway Co. sued out this writ of error.

ASSIGNMENT OF ERRORS.

1. The court below erred in refusing to give to the jury the following instruction asked by the plaintiff in error:

"In order to acquire a domicil and citizenship in Illinois, the plaintiff must have gone there in November, 1883, with the intention of remaining there permanently then. It was not enough if his intention was to go on to Janesville and finish his education there, and then return to Illinois and remain permanently. If such was his intention his citizenship in Illinois would only date from the time he in fact went there to stay permanently, which, according to his own testimony was March 13th, 1884."

2. The said court erred in refusing to give to the jury the third instruction asked by plaintiff in error, as follows:

"It is shown by the uncontroverted testimony of the plaintiff that he was a citizen of Iowa before he went to Janesville for the temporary purpose of acquiring an education in telegraphy; that in November, 1883, when it is claimed he changed his citizenship, he went to Chicago, in the state of Illinois, on his way to Janesville to complete his studies; that he remained in Chicago only temporarily at that time, and did not go to Illinois permanently until March 13th, 1884. Under these circumstances, the jury are instructed as matter of law, that the plaintiff did not become a citizen of Illinois until the date last mentioned, namely the 15th of March, 1884."

3. The said court erred in its 13th instruction to the jury, as follows:

"By way of illustration: If when he (Ohle) went to the city of Chicago in November, 1883, his object and purpose was simply to go through Chicago to Janesville to complete his education, with the intention sometime in the future of going back to Illinois, then he would not acquire his citizenship until he actually went there; but if, when he went in 1883, he went with the *intention* of actually changing his residence, and acquiring a citizenship in Chicago, Ill., then, if you find that to be a fact, you are justified in finding that he *changed* his citizenship within the meaning of the questions involved in this case." (Record 54, bottom.)

4. The said court erred in admitting in evidence the affidavit of Burt, division superintendent, in support of motion for security for costs, as follows:

"That the defendant has a good defense to the entire claim made by the plaintiff in said cause, and that the plaintiff is a non-resident of the state of Iowa, as he claims in his petitition in this case and as I verily believe." (Record 48.)

BRIEF.

It was long ago said by Chief Justice Marshall that:

"A citizen of the United States residing in a state of the Union is a citizen of that state."

Gassies v. Ballon. 6 Pet., 761.

It is obvious that the residence referred to is not a mere furtive, temporary, or fugitive residence, but in order to confer citizenship it must be a fixed and permanent abode, the equivalent of a domicil.

Story in treating of this matter says:

"The constitution having declared that the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states, every person who is a citizen of one state and removes into another, with the intention of taking up his residence and inhabitancy there, becomes *ipso facto* a citizen of the state where he resides; and he then ceases to be a citizen of the state from which he has removed his residence. Of course when he gives up his new residence or domicil, and returns to his native or other state, residence or domicil, he re-acquires the character of the latter. What circumstances shall constitute such a change of residence or *domicil*, is an inquiry more properly belonging to a treatise upon public or municipal law than to commentaries upon constitutional law. In general, however, it may be said that a removal from one state into another, *animo manendi*, or with a design of becoming an inhabitant, constitutes a change of domicil, and, of course a change of citizenship. *But a person who is a native citizen of one state never ceases to be a citizen thereof until he has acquired a new citizenship elsewhere.*

Story on Const., Sec. 1693.

This states the rule quite as favorably to Ohle as it can be claimed.

The domicil of a minor is the place of his birth, or the domicil of his parents, it they change from the place of his birth during his minority. This is elementary.

Story's Conflict of laws, Sec. 46.

The domicil and citizenship of Ohle was, therefore, that of his parents in Iowa, and as above stated, "it never ceased until he acquired a new citizenship elsewhere."

He was a minor when he received the injuries complained of, and he had barely attained his majority when it is claimed he changed his citizenship. (Record 41.)

Did his furtive and temporary halt in Chicago on his journey from his domicil of parentage in Iowa to his school in Wisconsin

change his domicil and citizenship from Iowa to Illinois? That is the question to be resolved, and it does not look difficult. It turns upon the residence or domicil necessary to citizenship. As to this it is said:

"To effect a change of domicil there must be intention and act united. The *forum originis* or domicil of nativity, remains until a subsequent domicil is acquired *animo et facto*.

Somerville v. Somerville, 5 Ves., 750.
2 Kent's Com., 431, *note e*.

"The domicil of origin arises from birth or connections. The domicil of a minor follows that of his father, and remains until he acquires another, which he cannot do until he becomes an adult."

Andrews v. Heriot, 4 Cowen, 516.

"Every person must have a domicil somewhere; and he can have but one domicil at one and the same time. Every person has a domicil of origin, which he retains until he acquires another, and the one thus acquired is in like manner retained until he acquires a third domicil. The existing domicil always continues until another is acquired."

Abington v. North Bridgewater, 23 Pick. 17.
Thorndike v. Boston, 1 Met., 242.
Killmer v. Bennett, 3 Met., 199.

What then is the residence or domicil which Ohle must have acquired in Illinois in order to become a citizen of that state.?

Domicil is defined by Webster to be a place of *permanent residence*, either of an *individual* or a family.

Chancellor Kent says a place where a man carries on his established business, or professional occupation and has a home *and permanent residence* is his domicil. 2 Kent's Com. 431, *note e*.

If a person leaves the place of his domicil temporarily or *for a particular purpose* and does not take up a *permanent residence* elsewhere he does not change his domicil.

Granby v. Amherst College, 7 Mass., 5.
Lincoln v. Hapgood, 11 Mass., 352.
Harvard College v. Gore, 5 Pick., 370.
Sears v. Boston, 1 Met., 250.

When Ohle left his domicil in Iowa for the "particular purpose" of completing his education in Wisconsin, did he take up his "permanent residence" in Chicago by a stay there of a few days while on his way to school? The proposition does not admit of discussion.

"The *intent* and *act* must concur, and until the intent was consummated by an actual *removal of his home* no change of domicil was effected."

Bangs v. Brewster, 111 Mass., 385.
Whitney v. Sherborn, 12 Allen, 111.
Carnoe v. Freetown, 9 Gray, 357.

It is, perhaps, difficult to say of what the *lares et penates* of a single man like Ohle should consist, as *indicia* of his home or permanent residence; but it is safe to say that something more is required than soiled linen, changed on the way from one washerwoman in Iowa to another washerwoman in Wisconsin.

This is not "residence at a particular place, accompanied by positive or presumptive proof of continuing it an *unlimited time*."

Re Wrigley, 8 Wend., 142.

And it is not a change of domicil within the meaning of any of the authorities.

The statutes and decisions of Illinois as to residence and citizenship are in accordance with what is urged above. It is specially provided by statute that a *permanent abode* is necessary to constitute a residence in the state under the election laws.

Illinois Rev. Stats. 1874, p. 490, Sec. 66.

Construing this statute the supreme court of Illinois has said:

"It would be safe to say a *permanent abode*, in the sense of the statute, means nothing more than a domicil, a home, which the party is at liberty to leave, as interest or whim may dictate, *but without any present intention* to change it."

And applying this statute to the undergraduates of a college in that state, the court said in the same case.

"As a general fact undergraduates of a college are no more identified with the residents of the town in which they are pursuing their studies, than the merest stranger, and should all the seats of learning in the United States by polled, not more than one student in twenty would be found to possess the proper qualification of a *resident* of the town."

Dale v. Irwin, 78 Ills., 181.

What then shall be said of the residence of Ohle who went to Chicago, on his way from his home, "a purpose to go back to Janesville" and attend school there? Is this a "permanent abode?" If so, attending school in Wisconsin is better evidence of a residence in Illinois, than attending school in Illinois itself.

And when an unmarried man, a citizen of Illinois, left that state, *taking all of his effects with him*, to find a better climate, and engaged in work in Kansas but returned to Illinois at the end of seven months it was held that his domicil was not changed and that he remained a citizen of Illinois.

Wilkins v. Marshall, 80 Ill., 74.

The court said:

"He has acquired no new residence, for if he had the *animus* to do so, the *factum* is wanting."

In this case Ohle claims to have had the *animus* in order to keep his action out of the United States court; but surely the *factum* was wanting. It is not shown that he had any of his effects with him; his stay in Chicago was furtive, as he testified himself in the most positive manner, and had none of the elements necessary to create residence or domicil. It was a transparent sham to oust the jurisdiction of the federal court and nothing else. The facts are undisputed and the court should have given the third instruction asked by the Railway Co., and set forth in the second assignment of errors supra.

The failure to give this instruction or its equivalent should reverse the judgment below. The jury should not have been left to find a change of residence against the testimony of Ohle himself, the only witness in the case.

The second instruction asked by the plaintiff in error should have been given. (Record 38.) The jury should have been told that "In order to acquire a domicil and citizenship in Illinois, Ohle must have gone there in November, 1883, with the intention of remaining there permanently then." It was not enough that he made a temporary halt there intending to return when he finished his studies.

It is not to be denied, and is not denied, that a change of citizenship may be made to oust the jurisdiction of, or confer jurisdiction upon, the federal courts. But such change must be an honest and *bona fide* one, and not a mere hollow formality, such as Ohle practiced. This is well illustrated by the adjudicated cases, one or two of which will suffice.

In a case where a party had been a citizen of Texas for twelve years, and went from there to Maryland for four months, after which he brought his suit in the federal court as a citizen of Maryland, there was a plea to the jurisdiction, for that he was a citizen of Texas. This court said opinion by Mr. Justice McLean.

"The change of citizenship, even for the purpose of bringing the suit in the federal court, must be with the *bona fide* intention of becoming a citizen of the state to which the party removes. Nothing short of this can give him a right to sue in the federal courts held in the state from whence he removed. If Teague was not a citizen of Maryland his short absence in that state without a *bona fide* intention of changing his citizenship, could give him no right to prosecute his suit."

Jones v. Teague, 18 How., 81.

The principle is the same whether a change of citizenship is made to oust the jurisdiction of the federal courts or confer jurisdiction upon them. Teague's claim of a change was based upon a four months' stay in Maryland, after being twelve years a citizen of Texas. Ohle's claim of like change is based upon a stay of three weeks in Illinois on his way to school, after being a citizen of Iowa by origin.

The following case was decided by Judge Story on the circuit:

The plaintiff claimed to have changed his citizenship from Rhode Island to Massachusetts, in order to sue a citizen of Rhode Island in the federal court. There was a plea to the jurisdiction on the ground that both parties were citizens of Rhode Island. Story, J.

"It appears to me very clear that there is no sufficient proof that the plaintiff is a citizen of Massachusetts. To effect that purpose it should be established that there was a *bona fide* change of domicil. I do not say that we can inquire into the motive for the change, or the reasons which influence a man to remove from one state to another. Be those motives or reasons what they may, there must still be a *bona fide* intention of removal and *a real change of domicil*. If a person, wishing to commence suits in the courts of the United States, instead of the state courts, chooses to remove into another state, and executes such intention *bona fide*, he may thereby change his citizenship. But his removal must be a real one, *animo manendi*, and not merely ostensible. Now, in the present case, no person can wink so hard as not to see that the plaintiff never had any intention to change his domicil. He went to Troy upon a *mere temporary visit, for a transient purpose*, and apparently for the sole purpose of suing out and serving the present process. He returned as soon as service was completed, and resumed his business as usual. How can such acts, construing them most favorably, for him, demonstrate any intentional change of his common domicil? As well might a man *passing into another state in the progress of a journey of business or pleasure* claim to be a citizen of such state. There must be some plain overt acts establishing a real removal of domicil. The return here followed too soon upon the removal, not to demonstrate that it was merely an ostensible, and not a real change of domicil. I, for one, feel no desire to encourage attempts of this nature and am willing that the state courts should retain all the jurisdiction over causes originating between citizens of the same state."

Verdict for defendant.

Case v. Clark, 5 Mason, 70.

In this case Ohle himself shows that he was merely "passing into another state in the progress of a journey of business," *i. e.* "*a purpose to*

go back to Janesville," when he claims to have acquired his citizenship in Illinois. He stopped in Chicago "apparently for the sole purpose of suing out and serving the present process" in the state court. When this was done, Nov. 20th, (Record 4) he went on to Janesville, arriving there about Nov. 26th. (Record 42, bottom.)

Under these circumstances, the court below should have told the jury, as Judge Story did:

"*There must be some plain overt acts establishing a real removal of domicil. The return here* (to Janesville) *followed too soon upon the removal not to demonstrate that it was merely an ostensible, and not a real change of domicil.*"

Ohle admits this when he says it was for the purpose of *keeping this case out of the federal court* (Record 45); and that when he went to Chicago, after he left his parents, *his plan was to go back to Janesville and stay until he finished his education.*

Yet the court refused the instructions asked by the Railway Co., covering this exact ground, and instructed that an *intention* to change his domicil while on his way to Janesville, was all that was required of Ohle. (Record 54, page 13.) Surely this is not the law.

II.

The issues tried to the jury were confined strictly to the citizenship of Ohle. No other question was submitted, as shown by the charge of the court. (Record 49–59.)

In fact, a demurrer was interposed by the Railway Co. (Record 37) to all of Ohle's pleas to the jurisdiction, except that he was a citizen of Illinois—which demurrer was sustained by the court.

On the issue of citizenship, as stated supra, the affidavit used on behalf of the Railway Co. in the state court, in support of its motion for security for costs, (see "facts" p. 3 hereof, bottom) was read in evidence for Ohle, against the objection and exception of the Railway Co. (Record 47–8.)

This was the mere statement of a division superintendent, "that the plaintiff (Ohle) is a *non-resident of the state of Iowa*, as he claims in his petition in this case, and *as I believe*."

This has no reference to the question of citizenship. It was not admissible as evidence of citizenship, nor as an admission of the Railway Co. It is easy to see how it would poison the mind of the jury, and its admission in evidence was such manifest error as should reverse the judgment below.

Respectfully submitted.

N. M. HUBBARD.
CHAS. A. CLARK.

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ADDENDUM.

The petition for removal filed in this case March 7th, 1884, (Record 9-11) was ample and sufficient to effect the removal of the case and to oust the jurisdiction of the state court, if the case was removable. It is true a subsequent petition for removal was filed on the 21st of March, 1884, as stated in the brief of defendant in error, but this was not a waiver of the original petition for its removal nor of its sufficiency. The record shows an exception to the action of the state court in refusing to allow a removal on the first petition.

Neither petition was allowed by the state court, whereupon the plaintiff in error took its transcript and filed it in the federal court, to which the case was removable. The second petition for removal was in all respects like the first except an explanation touching the affidavit of Division Superintendent Burt that Ohle was a non-resident of Iowa. The cause stood for determination upon the first petition and the entire instructions of the court below so dealt with it.

N. M. HUBBARD.

CHAS. A. CLARK.

117-123

IN THE

United States Supreme Court.

OCTOBER TERM, 1884.

NO. 1234

THE CHICAGO & NORTH-WESTERN RAILWAY CO.,
Plaintiff in Error.

Against

GUS. B. OHLE, *Defendant in Error.*

WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF IOWA.

HUBBARD & CLARK, AND WHITING S. CLARK, *For Plaintiff in Error.*

GEO. G. WRIGHT, *For Defendant in Error.*

IN THE

United States Supreme Court.

THE C. & N.-W. RY. CO.,
Plaintiff in Error,

vs.

GUS. B. OHLE,
Defendant in Error.

MOTION TO ADVANCE CAUSE ON THE DOCKET.

Now comes the said defendant in error, Gus. B. Ohle, by his attorney and moves the court to order said cause advanced on the docket, for the reasons following, viz.:

This action was instituted in the State Circuit Court of Iowa, and removed to United States Circuit Court for the Southern District of Iowa, on the petition of the plaintiff in error, on the sole ground that the plaintiff in error was a citizen of the State of Illinois, and the defendant in error was a citizen of the State of Iowa.

After trial to a jury, on a plea in abatement to the jurisdiction of said United States Circuit Court, and verdict for defendant in error, the said United States Circuit Court rendered judgment for the defendant in error, and the cause is now in this court on a writ of error under section 5 of the act of March 3, 1875, "to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from the State courts, and for other purposes."

GEO. G. WRIGHT,
Attorney for Defendant in Error.